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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

GEORGE L. REICHERT and ROBERT E. METLER,
Petitioners,

v.

VILLAGE OF MORTON GROVE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Should the courts below have abstained from deciding whether a village ordinance banning the possession of handguns violated the Illinois and United States Constitutions when the Illinois Supreme Court had never had the opportunity to interpret the state constitution's right to arms provision and a case involving the same village ordinance was pending before the Illinois state courts?

2. Does the Second Amendment's prohibition against infringement of the right to keep and bear arms apply through the Fourteenth Amendment to a village ordinance banning the keeping of handguns in the home?

PARTIES

The parties in the Court of Appeals were Petitioners George L. Reichert and Robert E. Metler, Victor D. Quilici, Robert Stengl, Martin Gutenkauf, Alice Gutenkauf, Walter J. Dutchak, Geoffrey LaGioia, and the Village of Morton Grove.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISIONS AND ORDINANCE INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR ALLOWING THE WRIT	6
1. BY DECIDING A CONTROLLING, UNRESOLVED QUESTION OF ILLINOIS CONSTITUTIONAL LAW RATHER THAN ABSTAINING, THE DISTRICT COURT AND THE COURT OF APPEALS DEPARTED SO FAR FROM THE ACCEPTED JUDICIAL COURSE AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION	6
2. IN LIGHT OF THIS COURT'S MODERN DECISIONS INCORPORATING ALL "FUNDAMENTAL RIGHTS" CONTAINED IN THE BILL OF RIGHTS INTO THE FOURTEENTH AMENDMENT'S DUE PROCESS CLAUSE, THIS COURT SHOULD REVISIT ITS 97-YEAR OLD PRECEDENT IN *PRESSER V. ILLINOIS*, 116 U.S. 252 (1886)	10
3. THE COURT OF APPEALS SERIOUSLY MISAPPLIED *UNITED STATES V. MILLER*, 307 U.S. 174 (1939), THIS COURT'S ONLY SUBSTANTIVE DECISION UNDER THE SECOND AMENDMENT, CALLING FOR AN EXERCISE OF THE COURT'S POWER OF SUPERVISION	15
CONCLUSION	18
APPENDIX	1a

TABLE OF AUTHORITIES

	Page(s)
CASES	
Adamson v. California, 332 U.S. 46 (1947)	13
Bellotti v. Baird, 428 U.S. 132 (1976)	8
Benton v. Maryland, 395 U.S. 784 (1969)	13
Bowers v. DeVito, 686 F.2d 616 (7th Cir. 1982)	15
Breithaupt v. Abram, 352 U.S. 342 (1957)	13
City of Las Vegas v. Moberg, 82 N.M. 626, 485 P.2d 737 (N.M. App. 1971)	17
DeJonge v. Oregon, 299 U.S. 353 (1937)	12
Dimick v. Schiedt, 293 U.S. 474 (1935)	16
Duncan v. Louisiana, 391 U.S. 145 (1968)	13
Elkins v. Moreno, 435 U.S. 647 (1978)	6
Engblom v. Carey, 677 F.2d 957 (2nd Cir. 1982)	13
Examining Board of Engineers, Architects and Surveyors v. Flores De Otero, 426 U.S. 572 (1976)	7
Fiske v. Kansas, 274 U.S. 380 (1927)	12
Gideon v. Wainwright, 372 U.S. 335 (1963)	13
Gitlow v. New York, 268 U.S. 652 (1925)	12
Grosjean v. American Press Co., 297 U.S. 233 (1936)	12
Hamilton v. Regents of the University of California, 293 U.S. 245 (1934)	12
Harrison v. NAACP, 360 U.S. 167 (1959)	8
Herndon v. Lowry, 301 U.S. 242 (1937)	12
Hunt v. Roth, 648 F.2d 1148 (8th Cir. 1981), *vacated as moot sub nom. Murphy v. Hunt*, 455 U.S. 478 (1982)	13
In Re Brickey, 8 Idaho 597, 70 P. 609 (1902)	17
Irvine v. California, 347 U.S. 128 (1954)	13
Kalodimos v. Village of Morton Grove, No. 82-282, slip op. (App. Ct. Ill. Feb. 9, 1983) *appeal filed*, No. __ (S.Ct. May 25, 1983)	4,9
Klopfer v. North Carolina, 386 U.S. 213 (1967)	13
Mallock v. Eastley, 87 Eng. Rep. 1370 (K.B. 1744)	14
Malloy v. Hogan, 378 U.S. 1 (1964)	13,14
McGrain v. Daugherty, 273 U.S. 135 (1927)	16

	Page(s)
Mapp v. Ohio, 367 U.S. 643 (1961)	13
Maxwell v. Dow, 176 U.S. 581 (1900)	12
Meridian v. Southern Bell Telephone & Telegraph Co., 358 U.S. 639 (1959)	8
Miller v. Texas, 153 U.S. 535 (1894)	11
Near v. Minnesota, 283 U.S. 697 (1931)	12
Palko v. Connecticut, 302 U.S. 319 (1937)	12,13
Patsone v. Pennsylvania, 232 U.S. 138 (1914)	16,17
People v. Zerillo, 219 Mich. 635, 189 N.W. 927 (1922)	17
Pointer v. Texas, 380 U.S. 400 (1965)	13
Powell v. Alabama, 287 U.S. 45 (1932)	12
Presser v. Illinois, 116 U.S. 252 (1886)	*passim*
Prudential Insurance Co. of America v. Cheek, 259 U.S. 530 (1922)	12
Quilici v. Village of Morton Grove, No. 81 C 3432 (N.D. Ill. Aug. 20, 1981)	4,9
Quilici v. Village of Morton Grove, 532 F. Supp. 1169 (N.D. Ill. 1981)	4
Quilici v. Village of Morton Grove, 695 F.2d 261 (7th Cir. 1982)	*passim*
Railroad Commission of Texas v. Pullman Co., 312 U.S. 496 (1941)	6
Reetz v. Bozanich, 397 U.S. 82 (1970)	7,10
Rex v. Dewhurst, 1 State Trials, New Ser. 529 (1820)	14
Rex v. Gardiner, 95 Eng. Rep. 386 (K.B. 1738)	14
Rex v. Gardner, 87 Eng. Rep. 1240 (K.B. 1739)	14
Rex v. Hartley, Cald. 175 (1782)	14
Rex v. Knight, 87 Eng. Rep. 75, 90 Eng. Rep. 330 (K.B. 1687)	14
Rex v. Thompson, 100 Eng. Rep. 10 (K.B. 1787)	14
Rinzler v. Carson, 262 So.2d 661 (Fla. 1972)	17
Riss v. City of New York, 22 N.Y.2d 579, 293 N.Y.S.2d 897, 240 N.E.2d 860 (1968)	15
Robinson v. California, 370 U.S. 660 (1962)	13
Schubert v. Debard, 398 N.E.2d 1339 (Ind.App. 1980)	17

	Page(s)
State v. Kerner, 181 N.C. 574, 107 S.E. 222 (1921)	17
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State v. Nickerson, 126 Mont. 157, 247 P.2d 188 (1952)	17
State v. Rosenthal, 75 Vt. 295, 55 A. 610 (1903)	17
Taylor v. McNeal, 523 S.W.2d 148 (Mo.App. 1975)	17
Twining v. New Jersey, 211 U.S. 78 (1908)	12
United States v. Miller, 307 U.S. 174 (1939)	15,16,17
Warren v. District of Columbia, 444 A.2d 1 (D.C.App. 1981)	15
Washington v. Texas, 388 U.S. 14 (1967)	13
Weeks v. United States, 232 U.S. 383 (1914)	12
Wolf v. Colorado, 338 U.S. 25 (1949)	13
Wingfield v. Stratford, 96 Eng. Rep. 787 (K.B. 1752)	14
CONSTITUTIONS	
U.S. Const., amend. II	*passim*
U.S. Const., amend. XIV	*passim*
Ill. Const., art. I, § 22	*passim*
STATUTES	
26 U.S.C. § 1132 (1934)	15
28 U.S.C. § 1254(1) (1976)	1
28 U.S.C. § 1331 (Supp. V 1981)	4
28 U.S.C. § 1441 (1976)	3
1 Stat. 271 (1792)	16
Ill. Rev. Stat. ch. 38, § 83-1 to 16.3 (1979)	3
Morton Grove, Ill. Ordinance No. 81-11 (June 8, 1981)	*passim*
I The Colonial Laws of New York from 1664 to the Revolution (1894)	16
VI Documents Relating to Colonial History of N.J. (W. Whitehead ed. 1882)	16
III Laws of Virginia from the First Session of the Legis. in 1619 (W. Hening ed. 1823)	16

Page(s)

III The Public Records of the Colony of Conn. (C. Hoadly ed. 1868) 16

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MISCELLANEOUS

Am. Rifleman, Sept. 1981 16
The Christian Science Monitor, Dec. 9, 1982 10
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

OPINIONS BELOW

The Memorandum Opinion and Order of the United States District Court is reported at 532 F. Supp. 1169 (N.D. Ill. 1981). The opinion of the United States Court of Appeals is reported at 695 F.2d 261 (7th Cir. 1982). Both opinions are reproduced in the Appendix.

JURISDICTION

The judgment sought to be reviewed was entered by the United States Court of Appeals for the Seventh Circuit on December 6, 1982. The Court of Appeals denied a timely filed petition for rehearing on March 2, 1983. Petitioners invoke the jurisdiction of this Court under section 1254(1) of Title 28, United States Code.

CONSTITUTIONAL PROVISIONS AND ORDINANCE INVOLVED

United States Constitution, Amendment II:

> A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

United States Constitution, Amendment XIV:

> SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> . . .

Illinois Constitution, Article 1, Section 22:

> Subject only to the police power, the right of the individual citizen to keep and bear arms shall not be infringed.

Morton Grove, Illinois Ordinance No. 81-11 (June 8, 1981) appears in the Appendix at pages 63a-69a, as an Appendix to the District Court's opinion.

STATEMENT OF THE CASE

This case involves the constitutionality of Village of Morton Grove, Illinois' ("Morton Grove") Ordinance No. 81-11, banning the possession of handguns. Appendix at 63a. Morton Grove enacted the ordinance, entitled "An Ordinance Regulating the Possession of Firearms and Other Dangerous Weapons," on June 8, 1981. The ordinance became effective on September 6, 1981, although its enforcement was stayed briefly pending the District Court's ruling on its validity.

In significant part, the ordinance provides that "no person shall possess, in the Village of Morton Grove . . . [a]ny handgun, unless the same has been rendered permanently inoperative." Appendix at 65a. The only exceptions are those pertaining to individuals such as peace officers, prison officials, and members of the armed forces. Violation of the handgun ban is punishable by a fine of up to $500.00 and incarceration for up to six months. The ordinance thus completely deprives private individuals in Morton Grove of the possession of handguns, even in the home. The ban is total and absolute.

Petitioners George L. Reichert and Robert E. Metler are residents of the Village of Morton Grove. They are law-abiding citizens and owners of operative handguns. In full compliance with Illinois law, each possesses a valid Illinois Firearms Owner's Identification Card. *See* Ill. Rev. Stat., ch. 38, § 83-1 to 16.3 (1979). However, under Ordinance 81-11, these lawfully licensed gun owners may not keep their handguns in their homes to protect themselves and their families.

On June 9, 1981, the day after Ordinance 81-11 was enacted, Victor D. Quilici brought the first action challenging the validity of Ordinance 81-11 in the Circuit Court of Cook County, Illinois. *Quilici v. Village of Morton Grove,* No. 81 CH 4439 (Cir. Ct. Cook County, filed June 9, 1981). The suit challenged the ordinance under both the Illinois and United States Constitutions. Citing the federal questions presented, however, Morton Grove removed that action to the United States District Court for the Northern District of Illinois pursuant to 28 U.S.C. § 1441 (1976).

Following the removal, Quilici forthwith asked the District Court to abstain and remand the case to the Cook County Circuit Court. The Illinois Supreme Court had never addressed the Illinois Constitution's separate right to arms provision, which provides: "Subject only to the police power, the right of the individual citizen to keep and bear arms shall not be infringed." Ill. Const., art. I, § 22. A ruling by the Illinois courts that Ordinance 81-11 violated the Illinois Constitution could have obviated the need for the District Court to address the

federal constitutional issues. Nonetheless, on August 20, 1981, the District Court declined to abstain. *Quilici v. Village of Morton Grove,* No. 81 C 3432 (N.D. Ill. Aug. 20, 1981) (order denying motion to abstain), *reproduced in* the Appendix at 72a-74a.

After the District Court refused to abstain, petitioners Reichert and Metler brought this separate action in the United States District Court. As in the *Quilici* case, petitioners contended that the Morton Grove ordinance violated both the Illinois and United States Constitutions, specifically Article I, Section 22 of the Illinois Constitution and the Second and Ninth Amendments to the United States Constitution as applied to the states and localities through the Fourteenth Amendment. Petitioners invoked the District Court's federal question jurisdiction, 28 U.S.C. § 1331 (Supp. V 1981). The Court, on its own motion, consolidated petitioners action with the *Quilici* case.[1]

Petitioners Reichert and Metler, along with others, also filed a separate action in the Circuit Court of Cook County challenging the validity of Ordinance 81-11 under the Illinois Constitution alone. Petitioners sought to obtain a definitive answer to the unresolved state constitutional question by the Illinois, not the federal, courts. Petitioners' Illinois action is currently pending before the Illinois Supreme Court. *Kalodimos v. Village of Morton Grove,* No. 82-282, slip op. (App. Ct. Ill. Feb. 9, 1983), *appeal filed,* No. __ (S. Ct. May 25, 1983).

The District Court issued its opinion in the federal case on December 29, 1981. It held that Ordinance 81-11 did not violate either the Illinois or United States Constitutions. On the federal questions, the District Court determined that the Second Amendment did not apply to state and local governments, relying on this Court's 1886 decision in *Presser v. Illinois,* 116 U.S. 252 (1886). The District Court simply declared that *Presser* was "still good law" and "controls this court." *Quilici v. Village of Morton Grove,* 532 F. Supp. 1169, 1182 (N.D. Ill. 1981), Appendix at 58a.

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[1] A third action, *Stengl v. Village of Morton Grove,* No. 81 C 4086 (N.D. Ill. complaint filed July 20, 1981), was also consolidated with these cases.

In a split decision, the Court of Appeals for the Seventh Circuit affirmed the District Court judgment. As an initial matter, the Court of Appeals also declined to abstain. It reasoned that an immediate federal decision was required because "the issue of gun control [is] of vital importance to every citizen." *Quilici v. Village of Morton Grove,* 695 F.2d 261, 265, n.2 (7th Cir. 1982), Appendix at 5a. Further, it found abstention unwarranted because it saw no "conflict between the federal and state systems" in light of Morton Grove's removal of the case to federal court. *Id.*

The majority of the Court of Appeals then followed the District Court's holding that the Second Amendment did not apply to the states or their political subdivisions. As did the District Court, the majority considered itself bound by its view of *Presser v. Illinois:* "[I]t is the law of the land and we are bound by it." *Id.* at 270, Appendix at 14a.

The dissenting judge of the Seventh Circuit panel vigorously took issue with the majority's decision. Disagreeing entirely with the other two members of the panel, he concluded that Ordinance 81-11 violated *both* the Illinois and United States Constitutions. As to the federal questions, he stated:

> The majority cavalierly dismisses the argument that the right to possess commonly owned arms for self-defense and the protection of loved ones is a fundamental right protected by the Constitution. Justice Cardozo in *Palko v. Connecticut,* 302 U.S. 319, 325, 58 S. Ct. 149, 151, 82 L.Ed. 288 (1937), defined fundamental rights as those rights "implicit in the concept of ordered liberty." Surely nothing could be more fundamental to the "concept of *ordered* liberty" than the basic right of an individual, within the confines of the criminal law, to protect his home and family from unlawful and dangerous intrusions.

Id. at 278, Appendix at 30a.

On March 2, 1983, the Court of Appeals denied a timely filed petition for rehearing and suggestion for rehearing *en banc*, with two judges dissenting. Appendix at 76a.

REASONS FOR ALLOWING THE WRIT

1. BY DECIDING A CONTROLLING, UNRESOLVED QUESTION OF ILLINOIS CONSTITUTIONAL LAW RATHER THAN ABSTAINING, THE DISTRICT COURT AND THE COURT OF APPEALS DEPARTED SO FAR FROM THE ACCEPTED JUDICIAL COURSE AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

The District Court and the Court of Appeals should not have addressed the difficult Second Amendment questions in this case until the Illinois courts had had an opportunity to consider the Illinois Constitution's right to arms provision. Both the District Court and the Court of Appeals should have abstained pursuant to *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941).

This Court has repeatedly explained that, in a federal system, it is often necessary for federal courts to abstain from deciding certain cases in order to ensure the furtherance of harmonious relations between state and federal authorities. *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941). In a federal system, it is crucial that important questions of state law be decided in the first instance by state, not federal, courts. *Elkins v. Moreno*, 435 U.S. 647 (1978). Not only does this course minimize federal-state conflict, but it also reduces the risk that federal courts will decide constitutional issues unnecessarily, when a conclusive state court answer to solely state law questions could avoid entirely a constitutional adjudication. *Pullman*, 312 U.S. at 500. As this Court has said, the federal courts should not "decide an issue by making a tentative answer which may be displaced tomorrow by a state adjudication" with the concomitant "friction of a premature constitutional adjudication." *Id.*

The threshold question before both courts below was whether Ordinance 81-11 violated Article I, Section 22 of the Illinois Constitution. That provision—which the Illinois Supreme Court has *never* interpreted—provides:

> Subject only to the police power, the right of the individual citizen to keep and bear arms shall not be infringed.

Ill. Const., art. I, § 22. That the provision is fairly capable of different constructions as applied to the Morton Grove ordinance at issue is plainly evident from the split decision of the Court of Appeals on this very question. *See Quilici,* 695 F.2d at 265-69 and 271-80, Appendix at 6a-12a and 16a-34a. The courts below should have abstained to have the Illinois constitutional issue resolved definitively by the Illinois courts rather than tentatively by the federal courts. By not abstaining, the courts below not only intruded into the Illinois state courts' proper domain, but also proceeded to decide important federal constitutional questions, possibly unnecessarily.[2]

This Court's decision in *Reetz v. Bozanich,* 397 U.S. 82 (1970), is on almost all fours with this case. In *Reetz,* the District Court had invalidated certain Alaskan fishing laws under both the Alaska and United States constitutions. This Court vacated that judgment and ordered the District Court to abstain, finding that a state court decision on the state constitutional issues presented "could conceivably avoid any decision under the Fourteenth Amendment and would avoid any possible irritant in the federal-state relationship." *Id.* at 87. Because "the nub of the whole controversy may be the state constitution," "the federal court should have stayed its hand while the parties repaired to the state courts for a resolution of their state constitutional questions." *Id.*

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[2] This is not a case where the state constitutional provision in issue simply mirrors or tracks a federal constitutional provision. *See Examining Board of Engineers, Architects and Surveyors v. Flores De Otero,* 426 U.S. 572 (1976). The Illinois Constitution's right to arms provision does not make any reference to the militia, as in the Second Amendment. It applies expressly to "the individual citizen" as compared to the Second Amendment's reference to "the people." And the Illinois Constitution specifically refers to the state police power, clearly a matter for the Illinois courts to address in the first instance.

The course federal courts should follow in these circumstances is also plainly set forth in this Court's decision in *Meridian v. Southern Bell Telephone & Telegraph Co.*, 358 U.S. 639 (1959):

> Proper exercise of federal jurisdiction requires that controversies involving unsettled questions of state law be decided in the state tribunals preliminary to a federal court's consideration of the underlying federal constitutional questions . . . [*W*]*hen the state court's interpretation of the statute or evaluation of its validity under the state constitution may obviate any need to consider its validity under the Federal Constitution, the federal court should hold its hand,* lest it render a constitutional decision unnecessarily.

358 U.S. at 640-41 (emphasis added).

The courts below rejected abstention for unwarranted and illogical reasons. The Court of Appeals stated that federal courts are reluctant to abstain "when fundamental rights such as voting, racial equality or rights of expression are involved." 695 F.2d at 265, n.2, Appendix at 5a. While petitioners agree wholeheartedly that fundamental rights are involved here, it was those very citizens trying to preserve their fundamental rights who asked the federal courts to abstain so that they could obtain a definitive state court determination of their state constitutional claims. The Court of Appeals transmogrified the very core of the abstention doctrine in telling petitioners that they should have a prompt *federal* decision when they were not asking for one.[3]

The Court of Appeals also rejected abstention because it viewed Morton Grove's voluntary removal of the case to federal court as eliminating any federal-state conflict. 695 F.2d at 265, n. 2, Appendix at 5a. There is no logic, however, in allowing a municipality to avoid its own state courts when its citizens, threatened with prosecution, seek a state forum to

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[3] Moreover, this Court has ordered abstention in many cases where fundamental rights were involved. *E.g., Bellotti v. Baird*, 428 U.S. 132 (1976) (abortion rights); *Harrison v. NAACP*, 360 U.S. 167 (1959) (racial discrimination).

determine the validity of the municipality's ordinances under state law. Morton Grove's removal of the case to federal court should be viewed not as a waiver but an attempt to evade a definitive state court determination of the consistency of its ordinance with the Illinois Constitution. Moreover, the Court of Appeals' reasoning ignores the principal basis for abstention: the avoidance of an unnecessary federal constitutional adjudication when the state court's determination could terminate the controversy.

The District Court's rationale for not abstaining was equally as flawed. *Quilici v. Village of Morton Grove,* No. 81 C 3432 (N.D. Ill. Aug. 20, 1981), Appendix at 72a-74a. In the District Court's view, because it had available the debates from the Illinois constitutional convention, and two Illinois *lower* courts had addressed Section 22 of the Illinois Constitution in other contexts, the meaning of the Illinois right to arms clause was "not wholly unsettled." Appendix at 73a. Yet, the District Court did not deny that the highest court of the state had never addressed the meaning of Section 22. And the Court of Appeals' split decision makes clear that the issue is far from settled.

Significantly, the Court of Appeals would not have had to send the parties back to a new state court litigation to have the state constitutional question resolved. The meaning of Section 22 was already before the Illinois state courts, on its way to the Illinois Supreme Court. *See Kalodimos v. Village of Morton Grove,* No. 82-282, slip op. (App. Ct. Ill. Feb. 9, 1983), *appeal filed* No. __ (S. Ct. May 25, 1983). What is more, the pending state action involves the *same* Morton Grove ordinance that was before the Court of Appeals. The Court of Appeals, well aware of these facts, ignored them.[4]

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[4] The Court of Appeals was seriously wrong in stating that only the amici briefs, and not petitioners, raised the abstention question. *Quilici,* 695 F.2d at 265, n. 2, Appendix at 5a. Petitioners filed a motion to abstain and supporting memorandum of law on April 8, 1982, in the Court of Appeals. Plaintiff-Appellants' Motion To Abstain and Memorandum of Law in Support of Plaintiff-Appellants' Motion To Abstain. And petitioners urged abstention at oral argument. At the District Court level, petitioners were compelled to file their federal complaint by the District Court's denial of Quilici's motion to remand his complaint to state court. In the absence of the District Court's action, petitioners would have litigated this case only in state court.

It is hard to imagine a clearer case for abstention. There unquestionably exists an unsettled question of state constitutional law. And the state courts are, in fact, in the very process of resolving that question *as it pertains to the same ordinance in question in the federal proceeding.* If this Court determined that abstention was the proper course in *Reetz,* where no state court action was even pending, abstention must be the proper course here. This Court should summarily vacate the opinions in this case and direct the Court of Appeals and the District Court to abstain, pending the Illinois Supreme Court's consideration of the threshold, state constitutional question.

2. IN LIGHT OF THIS COURT'S MODERN DECISIONS INCORPORATING ALL "FUNDAMENTAL RIGHTS" CONTAINED IN THE BILL OF RIGHTS INTO THE FOURTEENTH AMENDMENT'S DUE PROCESS CLAUSE, THIS COURT SHOULD REVISIT ITS 97-YEAR OLD PRECEDENT IN *PRESSER V. ILLINOIS*, 116 U.S. 252 (1886).

The Court of Appeals held that the Second Amendment does not apply to state and local governments. It did so by relying on a 97-year old decision of this Court, *Presser v. Illinois,* 116 U.S. 252 (1886). That decision long preceded the modern Fourteenth Amendment incorporation analysis that is now well established.

The impact of the Court of Appeals' decision, if left standing, will be enormous. Since the District Court rendered its decision in this case, Morton Grove has been inundated with requests for copies of Ordinance 81-11, as municipalities across the country apparently plan similar legislation. *Illinois Suburb Inspires A National Drive For Handgun Controls,* The Washington Post, Mar. 1, 1982, at A9, col. 1. Another source reports that "[l]awmakers in more than a dozen states are expected to have pro-gun control measures on their 1983 agendas." The Christian Science Monitor, Dec. 9, 1982, at 3, col. 3. The course that this gun legislation will take nationwide will be drastically affected by whether state and local governments are left to believe that the Second Amendment is inapplicable to them, as the Court of Appeals held.

This Court should not leave state and local governments to draft their legislation unguided on this important constitutional issue. Only by acting now to review the Court of Appeals' decision can the Court assure that subsequent legislation follows a course which does not infringe fundamental rights. Where as fundamental a guarantee of the Bill of Rights as the right to protect oneself and one's family in the home is at stake, the Court should avoid delay in addressing the issue. The dissenting judge of the Seventh Circuit panel noted the great "magnitude of the political and social implications of this case." 695 F.2d at 271, Appendix at 17a. The question of the Second Amendment's applicability to the states and their local subdivisions through the Fourteenth Amendment is of paramount importance.

Because this Court has not considered whether the Second Amendment's guarantees apply to the states since 1886, it has never applied a modern analysis to the question. Nor did the Court of Appeals. It simply cited this Court's ancient holding in *Presser v. Illinois,* 116 U.S. 252 (1886), that the Second Amendment by its terms "is a limitation only upon the power of congress and the national government, and not upon the state[s]." 116 U.S. at 265.

But *Presser* was decided before the Court even began to incorporate fundamental guarantees of the Bill of Rights into the Due Process Clause of the Fourteenth Amendment, to ensure their applicability to the states.[5] At the time of *Presser,* numerous cases, all explicitly or implicitly since overruled, held

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[5] A close reading of *Presser* reveals that the Court did not even address the issue of incorporation of the Second Amendment through the Fourteenth Amendment. The Court expressly held only that the Second Amendment by its own terms does not apply to the states. As to the applicability of the guarantees of the Bill of Rights to the states through the Fourteenth Amendment, the Court in *Presser* considered only the right to assemble, not the right to keep and bear arms, as it had first determined that the right to keep and bear arms was not infringed by a ban on private parties "parading with arms," which was the issue in *Presser.* 116 U.S. at 267. Subsequently, in *Miller v. Texas,* 153 U.S. 535, 538 (1894), the Court cited *Presser,* but only for the proposition that the Second Amendment itself applied to the Federal Government, not the states. As to the Fourteenth Amendment, the Court said: "[I]f the Fourteenth Amendment limited the power of the states as to such rights, as pertaining to citizens of the United States, we think it was fatal to this claim that it was not set up in the trial court." *Id.* at 538.

that neither the Privileges and Immunities Clause nor the Due Process Clause bound the states to comply with the guarantees of the Bill of Rights. *E.g., Maxwell v. Dow,* 176 U.S. 581 (1900) (no right to jury trial in criminal cases); *Twining v. New Jersey,* 211 U.S. 78 (1908) (no privilege against self-incrimination); *Weeks v. United States,* 232 U.S. 383 (1914) (no right to freedom from unreasonable searches and seizures); *Prudential Insurance Co. of America v. Cheek,* 259 U.S. 530 (1922) (no right to free speech).

Commencing in 1925 and continuing to the present day, the Court has firmly rejected the narrow view of the Fourteenth Amendment that prevailed in the late 19th and early 20th centuries. Starting with the substantive guarantees of the First Amendment, the Court began applying to the states on a case-by-case basis each fundamental guarantee of the Bill of Rights. *See, e.g., Gitlow v. New York,* 268 U.S. 652 (1925) (freedom of speech and press); *Fiske v. Kansas,* 274 U.S. 380 (1927) (freedom of speech); *Near v. Minnesota,* 283 U.S. 697 (1931) (freedom of the press); *Hamilton v. Regents of the University of California,* 293 U.S. 245 (1934) (free exercise of religion); *Grosjean v. American Press Co.,* 297 U.S. 233 (1936) (freedom of the press); *DeJonge v. Oregon,* 299 U.S. 353 (1937) (freedom of assembly); *Herndon v. Lowry,* 301 U.S. 242 (1937) (freedom of speech and assembly). *See also Powell v. Alabama,* 287 U.S. 45 (1932) (right to counsel). For the most part, these decisions distinguished or ignored adverse *Presser*-era precedents without explicitly overruling them. *See, e.g., Gitlow v. New York,* 268 U.S. at 666; *Fiske v. Kansas,* 274 U.S. at 386-87.

In the landmark case of *Palko v. Connecticut,* 302 U.S. 319 (1937), the Court harmonized its decisions. It explicitly articulated a new test for the content of the Due Process Clause which prevails to this day: "[I]mmunities that are valid as against the federal government by force of the specific pledges of particular amendments have been found to be implicit in the concept of ordered liberty, and thus, through the Fourteenth Amendment, become valid as against the states." 302 U.S. at 324-25 (footnote omitted). The *Presser* court did not apply this test.

This Court has adopted a broad and all-encompassing definition of rights "implicit in the concept of ordered liberty." [6] In its recent decisions, the Court has incorporated into the Fourteenth Amendment *every* explicit guarantee of the Bill of Rights it has considered and upheld *every* challenge to state violations of the explicit guarantees of the first eight amendments. *E.g., Mapp v. Ohio,* 367 U.S. 643 (1961) (Fourth Amendment exclusionary rule); *Robinson v. California,* 370 U.S. 660 (1962) (Eighth Amendment right to freedom from cruel and unusual punishment); *Gideon v. Wainwright,* 372 U.S. 335 (1963) (Sixth Amendment right to counsel); *Malloy v. Hogan,* 378 U.S. 1 (1964) (Fifth Amendment right to freedom from self-incrimination); *Pointer v. Texas,* 380 U.S. 400 (1965) (Sixth Amendment right to confront opposing witnesses); *Klopfer v. North Carolina,* 386 U.S. 213 (1967) (Sixth Amendment right to speedy trial); *Washington v. Texas,* 388 U.S. 14 (1967) (Sixth Amendment right to compulsory process for witnesses); *Duncan v. Louisiana,* 391 U.S. 145 (1968) (Sixth Amendment right to jury trial); *Benton v. Maryland,* 395 U.S. 784 (1969) (Fifth Amendment privilege against double jeopardy).[7]

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[6] The Court initially applied the *Palko* test somewhat cautiously. *See Palko v. Connecticut,* 302 U.S. at 328, *overruled, Benton v. Maryland,* 395 U.S. 784 (1969) (no privilege against double jeopardy); *Adamson v. California,* 332 U.S. 46, 54-56 (1947), *overruled, Malloy v. Hogan,* 378 U.S. 1 (1964) (state prosecutor may comment on accused's failure to testify); *Wolf v. Colorado,* 338 U.S. 25 (1949), *overruled, Mapp v. Ohio,* 367 U.S. 643 (1961) (exclusionary rule not applied to the states); *Irvine v. California,* 347 U.S. 128 (1954) (exclusionary rule); *Breithaupt v. Abram,* 352 U.S. 342 (1957) (exclusionary rule).

[7] *See also Engblom v. Carey,* 677 F.2d 957 (2d Cir. 1982), a recent decision which had no hesitation incorporating into the Fourteenth Amendment the Third Amendment's prohibition against quartering troops, and *Hunt v. Roth,* 648 F.2d 1148 (8th Cir. 1981), *vacated as moot sub nom. Murphy v. Hunt,* 455 U.S. 478 (1982), incorporating the excessive bail provision of the Eighth Amendment.

Presser v. Illinois cries out for revisiting. The guarantees of the Second Amendment should be tested to determine whether they meet the Court's current standard for incorporation through the Due Process Clause.[8] Particularly is this so in light of the fact that the Morton Grove ordinance prohibits the keeping of a handgun in the home. The fundamental nature of such a right has long been recognized. In *Rex v. Dewhurst,* 1 State Trials, New Ser. 529, 601-02 (1820), the jury was instructed:

> But are arms suitable to the condition of the people in the ordinary class of life, and are they allowed by law? *A man has a clear right to arms to protect himself in his house.* A man has a clear right to protect himself when he is going singly or in a small party upon the road where he is travelling or going for the ordinary purposes of business. But I have no difficulty in saying you have no right to carry arms to a public meeting, if the number of arms which are so carried are calculated to produce terror and alarm.

(Emphasis added.) *See Rex v. Thompson,* 100 Eng. Rep. 10, 12 (K.B. 1787) (it "is not an offense to keep or use a gun"); *Rex v. Hartley,* Cald. 175, 178 (1782) ("a gun may be used for . . . the protection of a man's house"); *Wingfield v. Stratford,* 96 Eng. Rep. 787 (K.B. 1752) ("a gun may be kept for the defense of a man's house"); *Mallock v. Eastley,* 87 Eng. Rep. 1370, 1374 (K.B. 1744) ("the mere having a gun was no offense . . . for a man may keep a gun for the defense of his house and family . . ."); *Rex v. Gardner,* 87 Eng. Rep. 1240, 1241 (1739); *Rex v. Gardiner,* 95 Eng. Rep. 386, 388 (K.B. 1738) (keeping a gun in the home is a "liberty which was allowed by the common law"); *Rex v. Knight,* 87 Eng. Rep. 75, 76, 90 Eng. Rep. 330 (K.B. 1687).

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[8] *See Malloy v. Hogan,* 378 U.S. 1, 5 (1964). In *Malloy,* the Court noted that it "has not hesitated to re-examine past decisions according the Fourteenth Amendment a less central role in the preservation of basic liberties than that which was contemplated by its Framers when they added the Amendment to our constitutional scheme." *Id.*

In current times, courts have repeatedly held that the police have no legal duty to protect the individual citizen. *Bowers v. DeVito,* 686 F.2d 616, 618 (7th Cir. 1982); *Warren v. District of Columbia,* 444 A.2d 1 (D.C. App. 1981); *Riss v. City of New York,* 22 N.Y. 2d 579, 293 N.Y.S. 2d 897, 240 N.E. 2d 860 (1968). Police are understaffed, and, even when adequately staffed, cannot possibly be expected always to protect individuals. Every citizen must be able to defend himself, his family, and his home.

3. THE COURT OF APPEALS SERIOUSLY MISAPPLIED *UNITED STATES V. MILLER*, 307 U.S. 174 (1939), THIS COURT'S ONLY SUBSTANTIVE DECISION UNDER THE SECOND AMENDMENT, CALLING FOR AN EXERCISE OF THE COURT'S POWER OF SUPERVISION.

The Court of Appeals further concluded that possession of handguns "is not part of the right to keep and bear arms." 695 F.2d at 271, Appendix at 15a. Relying on *United States v. Miller,* 307 U.S. 174 (1939), the Court of Appeals stated that the Second Amendment right to keep arms "is inextricably connected to the preservation of a militia" and "extends only to those arms which are necessary to maintain a well regulated militia." 695 F.2d at 270, Appendix at 14a. Inexplicably, however, the Court of Appeals concluded that "[u]nder the controlling authority of *Miller* . . . the right to keep and bear handguns is not guaranteed by the second amendment." *Id.* (footnote omitted), Appendix at 15a.

The conclusion drawn by the Court of Appeals seriously misapplies the *Miller* test. In *Miller,* the Court upheld the constitutionality of section 11 of the National Firearms Act, 26 U.S.C. § 1132j (1934), which prohibited interstate transportation of unregistered firearms. But that statute expressly excluded from its coverage *pistols or revolvers. Id.,* § 1132, *reproduced in* the Court's opinion, 307 U.S. at 175, n.1. *Miller* therefore never addressed the right to possess pistols.

Miller was decided on very narrow grounds. In addressing the short-barrel shotgun at issue in *Miller,* the Court held only

that there was no evidence, and it was not within judical notice, that a short-barrel shotgun "is any part of the ordinary military equipment or that it could contribute to the common defense." 307 U.S. at 178. Pistols are plainly arms vital to the preservation of a militia.

The Framers clearly contemplated that pistols would be protected militia arms. Colonial militia laws routinely required individuals to keep them. *See, e.g.,* I The Colonial Laws of New York from 1664 to the Revolution 232 (1894); III Laws of Virginia from the First Session of the Legis. in 1619 at 338 (W. Hening ed. 1823); III The Public Records of the Colony of Conn. 178 (C. Hoadly ed. 1868); III Records of the Colony of R.I. & Providence Plantations 433 (J. Bartlett ed. 1856); VI Documents Relating To Colonial History of N.J. 192-93 (W. Whitehead ed. 1882). The first federal militia statute also mentioned pistols. 1 Stat. 271, 272 (1792).

Pistols have also persisted since colonial times as common military arms. During World War II, for example, the War Department distributed a manual specifically recommending the keeping of arms "which a guerrilla in civilian clothes can carry without attracting attention. They must be easily portable and easily concealed. *First among these is the pistol.*" B. Levy, Guerrilla Warfare 56 (Panther Publications 1964) (emphasis added). To this day, the military continues to issue pistols to its personnel. *See Service Pistol Update,* Am. Rifleman, Sept. 1981, at 30. And the pistol is used by every armed force in the world. W.H.B. Smith, *Small Arms of the World passim* (11th rev. ed. 1977).

Moreover, the right to keep arms extends not only to the preservation of the militia, but also to the protection of self, family, and home. The Framers were protecting existing rights through the Bill of Rights, not creating new rights. *Dimick v. Schiedt,* 293 U.S. 474, 476 (1935); *McGrain v. Daugherty,* 273 U.S. 135, 156 (1927). As noted above, the right to defend oneself with arms has been fundamental throughout history. And the possession of pistols is basic to self-protection, if not, in fact, necessary to it. *Cf. Patsone v. Pennsylvania,* 232 U.S. 138,

143 (1914) (Holmes, J.) (distinguishing a pistol from rifles and shotguns as an arm necessary to self-defense). A pistol is *both* a militia arm, protected by the Second Amendment as interpreted by this Court's holding in *Miller*, and an important instrument of self-defense, especially in the home.[9]

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[9] Numerous state courts have held, explicitly or implicitly, that handguns are constitutionally protected arms. *State v. Kessler*, 289 Or. 359, 614 P.2d 94, 98-99 (1980); *Schubert v. DeBard*, 398 N.E.2d 1339 (Ind.App. 1980) ("handgun"); *Taylor v. McNeal*, 523 S.W.2d 148, 150 (Mo.App. 1975) ("pistols"); *Rinzler v. Carson*, 262 So.2d 661, 666 (Fla. 1972) ("semi-automatic pistols"); *City of Las Vegas v. Moberg*, 82 N.M. 626, 485 P.2d 737 (N.M.App. 1971) ("pistols"); *State v. Nickerson*, 126 Mont. 157, 247 P.2d 188, 192 (1952) ("revolver"); *People v. Zerillo*, 219 Mich. 635, 189 N.W. 927 (1922) ("revolver"); *State v. Kerner*, 181 N.C. 574, 107 S.E. 222, 224 (1921) ("pistol"); *State v. Rosenthal*, 75 Vt. 295, 55 A. 610 (1903) ("revolver"); *In Re Brickey*, 8 Idaho 597, 70 P. 609 (1902) ("revolver").

See also, Malcolm, *The Right of the People to Keep and Bear Arms: The Common Law Tradition*, 10 Hastings Const. L.Q. ___ (1983); Caplan, *The Right of the Individual to Bear Arms: A Recent Judicial Trend*, 1982 Det. C.L. Rev. 789; Shalhope, *The Ideological Origins of the Second Amendment*, 69 J. Am. Hist. 599 (1982); Halbrook, *To Keep and Bear Their Private Arms: The Adoption of the Second Amendment, 1787-1791*, 10 N. Ky. L. Rev. 13 (1982); Gardiner, *To Preserve Liberty—A Look at the Right to Keep and Bear Arms*, 10 N. Ky. L. Rev. 63 (1982); Halbrook, *The Jurisprudence of the Second and Fourteenth Amendments*, 4 Geo. Mason U. L. Rev. 1 (1981); Cantrell, *The Right to Keep and Bear Arms*, 53 Wis. Bar Bull. 21 (1980); Caplan, *Handgun Control: Constitutional or Unconstitutional?*, 10 N.C. Central L.J. 53 (1978); Caplan, *Restoring the Balance: The Second Amendment Revisted*, 5 Fordham Urban L.J. 31 (1976); Whisker, *Historical Development and Subsequent Erosion of the Right to Keep and Bear Arms*, 78 W. Va. L. Rev. 171 (1976); Weiss, *A Reply to Advocates of Gun Control Law*, 52 J. Urban L. 577 (1974); Hardy & Stompoly, *Of Arms and the Law*, 51 Chi-Kent L. Rev. 62 (1974); McClure, *Firearms and Federalism*, 7 Idaho L. Rev. 197 (1970); Levine & Saxe, *The Second Amendment: The Right to Bear Arms*, 7 Houston L. Rev. 1 (1969); Olds, *The Second Amendment and the Right to Keep and Bear Arms*, 46 Mich. St. B.J. 15 (1967); Comment, *The Right to Keep and Bear Arms: A Necessary Constitutional Guarantee or an Outmoded Provision of the Bill of Rights?*, 31 Alb. L. Rev. 74 (1967); Sprecher, *The Lost Amendment*, 51 A.B.A.J. 554 & 665 (2 parts) (1965); Hays, *The Right to Bear Arms, A Study in Judicial Misinterpretation*, 2 Wm. & Mary L. Rev. 381 (1960).

CONCLUSION

The Court should vacate summarily the Seventh Circuit's opinion and direct the courts below to abstain. Should the Court regard summary action as inappropriate, the writ should be granted for the reasons set forth above.

Respectfully submitted,

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May 31, 1983

UNITED STATES COURT OF APPEALS,

SEVENTH CIRCUIT.

VICTOR D. QUILICI, ROBERT STENGL, *et al.*, GEORGE L. REICHERT, and ROBERT E. METLER,
Plaintiffs-Appellants.

v.

VILLAGE OF MORTON GROVE, *et al.*,
Defendants-Appellees.

Nos. 82-1045, 82-1076 and 82-1132.

Argued May 28, 1982.

Decided Dec. 6, 1982.

As Amended Dec. 10, 1982.

Before BAUER, WOOD, and COFFEY, Circuit Judges.

BAUER, Circuit Judge.

This appeal concerns the constitutionality of the Village of Morton Grove's Ordinance No. 81-11,[1] which prohibits the

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[1] Ordinance No. 81-11, in pertinent part, provides:

AN ORDINANCE REGULATING THE POSSESSION OF FIREARMS AND OTHER DANGEROUS WEAPONS

Whereas, it has been determined that in order to promote and protect the health and safety and welfare of the public it is necessary to regulate the possession of firearms and other dangerous weapons, and

Whereas, the Corporate Authorities of the Village of Morton Grove have found and determined that the easy and convenient availability of certain types of firearms and weapons have increased the potentiality of firearm related deaths and injuries, and

Whereas, handguns play a major role in the commission of homicide, aggravated assault, and armed robbery, and accidental injury and death.

NOW, THEREFORE, BE IT ORDAINED BY THE PRESIDENT AND BOARD OF TRUSTEES OF THE VILLAGE OF MORTON GROVE, COOK COUNTY, ILLINOIS, AS FOLLOWS:

SECTION 1: The Corporate Authorities do hereby incorporate the foregoing WHEREAS clauses into the Ordinance, thereby making the findings as hereinabove set forth.

(footnote continues)

possession of handguns within the Village's borders. The district court held that the Ordinance was constitutional. We affirm.

(footnote continued)

SECTION 2: That Chapter 132 of the Code of Ordinances of the Village of Morton Grove be and is hereby amended by the addition of the following section:

"*Section* 132.102. Weapons Control

(A) Definitions:

Firearm: "Firearm" means any device, by whatever name known, which is designed to expel a projectile or projectiles by the action of an explosion, expansion of gas or escape of gas; excluding however:

(1) Any pneumatic gun, spring gun or B-B gun which expels a single globular projectile not exceeding .18 inches in diameter.

(2) Any device used exclusively for signaling or safety and required or recommended by the United States Coast Guard or the Interstate Commerce Commission.

(3) Any device used exclusively for the firing of stud cartridges, explosive rivets or similar industrial ammunition.

(4) An antique firearm (other than a machine gun) which, although designed as a weapon, the Department of Law Enforcement of the State of Illinois finds by reason of the date of its manufacture, value, design and other characteristics is primarily a collector's item and is not likely to be used as a weapon.

(5) Model rockets designed to propel a model vehicle in a vertical direction.

Handgun: Any firearm which (a) is designed or redesigned or made or remade, and intended to be fired while held in one hand or (b) having a barrel of less than 10 inches in length or (c) a firearm of a size which may be concealed upon the person.

Person: Any individual, corporation, company, association, firm, partnership, club, society or joint stock company.

Handgun Dealer: Any person engaged in the business of (a) selling or renting handguns at wholesale or retail (b) manufacture of handguns (c) repairing handguns or making or firing special barrels or trigger mechanisms to handguns.

Licensed Firearm Collector: Any person licensed as a collector by the Secretary of the Treasury of the United States under and by virtue of Title 18, United States Code, Section 923.

Licensed Gun Club: A club or organization, organized for the purpose of practicing shooting at targets, licensed by the Village of Morton Grove under Section 90.20 of the Code of Ordinances of the Village of Morton Grove.

(B) Possession:

No person shall possess, in the Village of Morton Grove the following:

(1) Any bludgeon, black-jack, slug shot, sand club, sand bag, metal

(footnote continues)

I

Victor D. Quilici initially challenged Ordinance No. 81-11 in state court. Morton Grove removed the action to federal court where it was consolidated with two similar actions, one

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(footnote continued)

knuckles or any knife, commonly referred to as a switchblade knife, which has a blade that opens automatically by hand pressure applied to a button, spring, or other device in the handle of the knife, or

(2) Any weapon from which 8 or more shots or bullets may be discharged by a single function of the firing device, any shotgun having one or more barrels less than 18 inches in length, sometimes called a sawed off shotgun or any weapon made from a shotgun, whether by alteration, modification or otherwise, if such weapon, as modified or altered has an overall length of less than 26 inches, or a barrel length of less than 18 inches or any bomb, bomb-shell, grenade, bottle or other container containing an explosive substance of over one-quarter ounce for like purposes, such as, but not limited to black powder bombs and molotov cocktails or artillery projectiles; or

(3) Any handgun, unless the same has been rendered permanently inoperative.

(C) Subsection B(1) shall not apply to or affect any peace officer.

(D) Subsection B(2) shall not apply to or affect the following:

(1) Peace officers;

(2) Wardens, superintendents and keepers of prisons, penitentiaries, jails and other institutions for the detention of persons accused or convicted of an offense;

(3) Members of the Armed Services or Reserve Forces of the United States or the Illinois National Guard, while in the performance of their official duties; and

(4) Transportation of machine guns to those persons authorized under Subparagraphs (1) and (2) of this subsection to possess machine guns, if the machine guns are broken down in a non-functioning state or not immediately accessible.

(E) Subsection B(3) does not apply to or affect the following:

(1) Peace officers or any person summoned by any peace officer to assist in making arrests or preserving the peace while he is actually engaged in assisting such officer and if such handgun was provided by the peace officer;

(2) Wardens, superintendents and keepers of prisons, penitentiaries, jails and other institutions for the detention of persons accused or convicted of an offense;

(3) Members of the Armed Services or Reserve Forces of the United States or the Illinois National Guard or the Reserve Officers Training Corps while in the performance of their official duties.

(4) Special Agents employed by a railroad or a public utility to perform police functions; guards of armored car companies; watchmen and security

(footnote continues)

brought by George L. Reichert and Robert E. Metler (collectively Reichert) and one brought by Robert Stengl, Martin Gutenkauf, Alice Gutenkauf, Walter J. Dutchak and Geoffrey Lagonia (collectively Stengl). Plaintiffs alleged that Ordinance No. 81-11 violated article I, section 22 of the Illinois Constitution and the second, ninth and fourteenth amendments of the United States Constitution. They sought an order declaring the Ordinance unconstitutional and permanently enjoining its enforcement. The parties filed cross motions for summary judgment. The district court granted Morton Grove's motion for summary judgment and denied plaintiffs' motions for summary judgment.

In its opinion, *Quilici v. Village of Morton Grove*, 532 F.Supp. 1169 (N.D.Ill. 1981), the district court set forth several reasons for upholding the handgun ban's validity under the state and federal constitutions. First, it held that the Ordinance

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(footnote continued)

guards actually and regularly employed in the commercial or industrial operation for the protection of persons employed and private property related to such commercial or industrial operation;

(5) Agents and investigators of the Illinois Legislative Investigating Commission authorized by the commission to carry such weapons;

(6) Licensed gun collectors;

(7) Licensed gun clubs provided the gun club has premises from which it operates and maintains possession and control of handguns used by its members, and has procedures and facilities for keeping such handguns in a safe place, under the control of the club's chief officer, at all times when they are not being used for target shooting or other sporting or recreational purposes at the premises of the gun club; and gun club members while such members are using their handguns at the gun club premises;

(8) A possession of an antique firearm;

(9) Transportation of handguns to those persons authorized under Subparagraphs 1 through 8 of this subsection to possess handguns, if the handguns are broken down in a non-functioning state or not immediately accessible.

(10) Transportation of handguns by persons from a licensed gun club to another licensed gun club or transportation from a licensed gun club to a gun club outside the limits of Morton Grove; provided however that the transportation is for the purpose of engaging in competitive target shooting or for the purpose of permanently keeping said handgun at such new gun club; and provided further that at all times during such transportation said handgun shall have trigger locks securely fastened to the handgun.

which banned only certain kinds of arms was a valid exercise of Morton Grove's police power and did not conflict with section 22's conditional right to keep and bear arms. Second, relying on *Presser v. Illinois,* 116 U.S. 252, 6 S.Ct. 580, 29 L.Ed. 615 (1886), the court concluded that the second amendment's guarantee of the right to bear arms has not been incorporated into the fourteenth amendment and, therefore, is inapplicable to Morton Grove. Finally, it stated that the ninth amendment does not include the right to possess handguns for self-defense. Appellants contend that the district court incorrectly construed the relevant constitutional provisions, assigning numerous errors based on case law, historical analysis, common law traditions and public policy concerns.[2]

While we recognize that this case raises controversial issues which engender strong emotions, our task is to apply the law as

[2] Three amici briefs were also filed, by the Illinois State Rifle Association, the Handgun Control, Inc., and the States of Arizona, Connecticut, Hawaii, Idaho, Louisiana, Missouri, Montana, Nevada, North Carolina, Oregon and Wyoming collectively. We have considered the arguments raised in these briefs and find that, for the most part, they raise the same arguments as those raised by the parties.

However, the states' amici curiae brief raises one issue not raised by the parties or addressed by the district court. The states argue that the district court should have abstained because the federal court may not construe a state constitutional provision when the state court has not yet had the opportunity to construe that provision. Amici Curiae br. at 8. The states admit that abstention is not required when the state constitutional provision parallels the federal constitutional provision. However, relying on *Railroad Comm'n v. Pullman Co.,* 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941), they assert that the state constitutional provision involved in this case is unique, and thus, the federal court should not have prematurely usurped the state's prerogative to interpret its own constitution.

We disagree. Since abstention is not mandatory, the federal court must determine whether abstention is appropriate in a particular case. 1A Moore's Federal Practice § 0.203[1] at 2105 (1977). Federal courts have been reluctant to abstain when fundamental rights such as voting, racial equality or rights of expression are involved. *Id.* at 2111-12. We consider the issue of gun control of vital importance to every citizen and, for this reason, do not believe that abstention is any more appropriate in this case than in cases where fundamental rights are involved. Moreover, the purpose of the abstention doctrine is to minimize the conflict between the federal and state systems. *Railroad Comm'n v. Pullman Co.,* 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941). There is no conflict here, for Morton Grove voluntarily removed this case to federal court. Accordingly, we find that the abstention doctrine has no relevance.

it has been interpreted by the Supreme Court, regardless of whether that Court's interpretation comports with various personal views of what the law should be. We are also aware that we must resolve the controversy without rendering unnecessary constitutional decisions. *Richard Nixon v. A. Ernest Fitzgerald,* ___ U.S. ____, 102 S. Ct. 2690, 73 L.Ed.2d 349 (1982). With these principles in mind we address appellants' contentions.

II

We consider the state constitutional issue first. The Illinois Constitution provides:

> Subject only to the police power, the right of the individual citizen to keep and bear arms shall not be infringed.

Ill. Const. art. I, § 22. The parties agree that the meaning of this section is controlled by the terms "arms" and "police power" but disagree as to the scope of these terms.

Relying on the statutory construction principles that constitutional guarantees should be broadly construed and that constitutional provisions should prevail over conflicting statutory provisions, appellants allege that section 22's guarantee of the right to keep and bear arms prohibits a complete ban of any one kind of arm. They argue that the constitutional history of section 22 establishes that the term "arms" includes those weapons commonly employed for "recreation or the protection of person and property," 6 Record of Proceedings, Sixth Illinois Constitutional Convention 87 (Proceedings), and contend that handguns have consistently been used for these purposes.

Appellants concede that the phrase "subject to the police power" does not prohibit reasonable regulation of arms. Thus, they admit that laws which require the licensing of guns or which restrict the carrying of concealed weapons or the possession of firearms by minors, convicted felons, and incompetents are valid. However, they maintain that no authority supports interpreting section 22 to permit a ban on the possession of handguns merely because alternative weapons are not also banned. They argue that construing section 22 in this manner

would lead to the anomalous situation in which one municipality completely bans handguns while a neighboring municipality completely bans all arms but handguns.

In contrast, Morton Grove alleges that "arms" is a general term which does not include any specific kind of weapon. Relying on section 22's language, which they characterize as clear and explicit, Morton Grove reads section 22 to guarantee the right to keep only some, but not all, arms which are used for "recreation or the protection of person and property." It argues that the Ordinance passes constitutional muster because standard rifles and shot guns are also used for "recreation or the protection of person and property" and Ordinance No. 81-11 does not ban these weapons.

While Morton Grove does not challenge appellants' assertion that "arms" includes handguns, we believe that a discussion of the kind of arms section 22 protects is an appropriate place to begin our analysis. Because we disagree with Morton Grove's assertion that section 22's language is clear and explicit, we turn to the constitutional debates for guidance on the proper construction of arms.[3] *Client Follow-Up Co. v. Hynes,* 75 Ill.2d 208, 216, 28 Ill.Dec. 488, 390 N.E.2d 847, 850 (1979), citing *Wolfson v. Avery,* 6 Ill.2d 78, 126 N.E.2d 701 (1955).[4]

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[3] In construing section 22, the district court also relied heavily on the constitutional debates. Appellants challenge this reliance, arguing that constitutional ambiguities are best resolved by the voters' understanding at the time of the vote on the proposed constitution. Appellants contend that the voters' understanding should be gleaned from : (1) the Official Explanation published prior to the ratification vote; (2) newspaper articles discussing the proposed section 22; and (3) the meaning which the voters were likely to have attributed to the term "police power." Since the district court thoroughly analyzed, and properly rejected, this theory of statutory construction, *Quilici v. Village of Morton Grove,* 532 F.Supp. at 1174-75, we need not repeat that analysis here.

[4] Reichert cites *Client Follow-Up Co. v. Hynes,* 75 Ill.2d 208, 28 Ill.Dec. 488, 390 N.E.2d 847 (1979) to support his assertion that the district court erroneously relied on the constitutional convention debates to construe section 22. He contends that *Client Follow-Up* holds that constitutional convention debates are useful only when those debates demonstrate a consensus among the delegates. Reichert correctly states the *Client Follow-Up* holding, but ignores the fact that the Proceedings indicate a majority consensus among the delegates as to the meaning of section 22. *See, e.g.,* 3 Proceedings 1711, 1717-19, 1818.

The debates indicate that the category of arms protected by section 22 is not limited to military weapons; the framers also intended to include those arms that "law-abiding persons commonly employ[ed]" for "recreation or the protection of person and property." 6 Proceedings 87. Handguns are undisputedly the type of arms commonly used for "recreation or the protection of person and property."

Our conclusion that the framers intended to include handguns in the class of protected arms is supported by the fact that in discussing the term the Proceedings refer to *People v. Brown,* 253 Mich. 537, 541-42, 235 N.W. 245, 246-47 (1931) and *State v. Duke,* 42 Tex. 455, 458 (1875). *Brown* defines weapons as those "relied upon . . . for defense or pleasure," including "ordinary guns" and "revolvers." 253 Mich. at 542, 235 N.W. at 247. *Duke* states that "[t]he arms which every person is secured the right to keep and bear (in defense of himself or the State, subject to legislative regulation), must be such arms as are commonly kept, . . . and are appropriate for . . . self-defense, as well as such as are proper for the defense of the State." 42 Tex. at 458. The delegates' statements and reliance on *Brown* and *Duke* convinces us that the term arms in section 22 includes handguns.

Having determined that section 22 includes handguns within the class of arms protected, we must now determine the extent to which a municipality may exercise its police power to restrict, or even prohibit, the right to keep and bear these arms. The district court concluded that section 22 recognizes only a narrow individual right which is subject to substantial legislative control. It noted that "[t]o the extent that one looks to the convention debate for assistance in reconciling the conflict between the right to arms and the exercise of the police power, the debate clearly supports a narrow construction of the individual right." *Quilici v. Village of Morton Grove,* 532 F.Supp. at 1174. It further noted that while the Proceedings cite some cases holding that the state's police power should be read restrictively, those cases were decided under "distinctly different constitutional provisions" and, thus, have little application to this case. *Id.* at 1176.

We agree with the district court that the right to keep and bear arms in Illinois is so limited by the police power that a ban on handguns does not violate that right. In reaching this conclusion we find two factors significant. First, section 22's plain language grants only the right to keep and bear arms, not handguns. Second, although the framers intended handguns to be one of the arms conditionally protected under section 22, they also envisioned that local governments might exercise their police power to restrict, or prohibit, the right to keep and bear handguns. For example, Delegate Foster, speaking for the majority, explained:

> It could be argued, that, in theory, the legislature now [prior to the adoption of the 1970 Illinois Constitution] has the right to ban all firearms in the state as far as individual citizens owning them is concerned. That is the power which we wanted to restrict—an absolute ban on all firearms.

3 Proceedings 1688. Delegate Foster then noted that section 22 "would prevent a complete ban on all guns, but there could be a ban on certain categories." *Id.* at 1693.[5] It is difficult to imagine clearer evidence that section 22 was intended to permit a municipality to ban handguns if it so desired.

Appellants argue that construing section 22 to protect only some unspecified categories of arms, thereby allowing municipalities to exercise their police power to enact dissimilar gun control laws, leads to "untenable" and "absurd" results. Quilici br. at 14. This argument ignores the fact that the Illinois Constitution authorizes local governments to function as home

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[5] The Proceedings are replete with other statements supporting our holding. See, for example, Delegate Foster's statement that "we feel that under . . . [section 22] . . . the state would have the right to prohibit some classes of firearms, such as war weapons, handguns, or some other category." 3 Proceedings 1818. See also his statement immediately prior to the vote on the proposed section 22 that: "[i]t is the position of the majority that under the police power of the state, the legislature would have the authority, for example, to forbid all handguns . . . [and] it is still the position of the majority that short of an absolute and complete ban on the possession of all firearms, this provision would leave the legislature free to regulate the use of firearms in Illinois." 3 Proceedings 1718.

rule units to "exercise any power and perform any function pertaining to its government and affairs." Illinois Const. art. VIII, § 6(a). Home rule government[6] is based on the theory that local governments are in the best position to assess the needs and desires of the community and, thus, can most wisely enact legislation addressing local concerns. *Carlson v. Briceland,* 61 Ill.App.3d 247, 18 Ill.Dec. 502, 377 N.E.2d 1138 (1978). Illinois home rule units have expansive powers to govern as they deem proper, *see generally* Hall & Wallack, *Intergovernmental Cooperation and the Transfer of Powers,* 1981 U.Ill.L.Rev. 775, 777-79; Vitullo & Peters, *Intergovernmental Cooperation and the Municipal Insurance Crisis,* 30 DePaul L.Rev. 325, 326-29 (1981); including the authority to impose greater restrictions on particular rights than those imposed by the state. *See City of Evanston v. Create, Inc.,* 85 Ill.2d 101, 51 Ill.Dec. 688, 421 N.E.2d 196 (1981). The only limits on their autonomy are those imposed by the Illinois Constitution, *City of Carbondale ex rel. Ham v. Eckert,* 76 Ill.App.3d 881, 32 Ill.Dec. 377, 395 N.E.2d 607 (1979), or by the Illinois General Assembly exercising its authority to preempt home rule in specific instances. Because we have concluded that the Illinois Constitution permits a ban on certain categories of arms, home rule units such as Morton Grove may properly enact different, even inconsistent, arms restrictions. This is precisely the kind of local control envisioned by the new Illinois Constitution.

Appellants concede that municipalities may, under the Illinois Constitution, exercise their police power to enact regulations which prohibit "possession of items legislatively found

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[6] Ill. Const. Art. VII, § 6(a) provides:

A County which has a chief executive officer elected by the county and any municipality which has a population of more than 25,000 are home rule units. Other municipalities may elect by referendum to become home rule units. Except as limited by this Section, a home rule unit may exercise any power and perform any function pertaining to its government and affairs including, but not limited to, the power to regulate for the protection of the public health, safety, morals and welfare; to license; to tax and to incur debt.

The parties do not dispute the fact that Morton Grove is a home rule unit and the court notes that, in 1980, Morton Grove passed a referendum maintaining its home rule status pursuant to Ill. Const. Art. VII § 6(a).

to be dangerous . . .", Quilici br. at 9. They draw a distinction, however, between the exercise of the police power in general and the exercise of the police power with respect to a constitutionally protected right. Indeed, they vehemently insist that a municipality may not exercise its police power to completely prohibit a constitutional guarantee.

We agree that the state may not exercise its police power to violate a positive constitutional mandate, *People v. Warren,* 11 Ill.2d 420, 143 N.E.2d 28 (1957), but we reiterate that section 22 simply prohibits an absolute ban on all firearms. Since Ordinance No. 81-11 does not prohibit all firearms, it does not prohibit a constitutionally protected right. There is no right under the Illinois Constitution to possess a handgun, nor does the state have an overriding state interest in gun control which requires it to retain exclusive control in order to prevent home rule units from adopting conflicting enactments. *See City of Evanston v. Create, Inc.,* 85 Ill.2d 101, 51 Ill.Dec. 688, 421 N.E.2d 196 (1981). Accordingly, Morton Grove may exercise its police power to prohibit handguns even though this prohibition interferes with an individual's liberty or property. *People v. Warren,* 11 Ill.2d 420, 143 N.E.2d 28 (1957).

The Illinois Constitution establishes a presumption in favor of municipal home rule. *Carlson v. Briceland,* 61 Ill.App.3d 247, 18 Ill.Dec. 502, 377 N.E.2d 1138 (1978). Once a local government identifies a problem and enacts legislation to mitigate or eliminate it, that enactment is presumed valid and may be overturned only if it is unreasonable, clearly arbitrary, and has no foundation in the police power. *Illinois Gamefowl Breeders Ass'n v. Block,* 75 Ill.2d 443, 27 Ill.Dec. 465, 389 N.Ed2d 529 (1979); *People v. Copeland,* 92 Ill.App.3d 475, 47 Ill.Dec. 860, 415 N.E.2d 1173 (1st Dist.1980). Thus, it is not the province of this court to pass judgment on the merits of Ordinance No. 81-11; our task is simply to determine whether Ordinance No. 81-11's restrictions are rationally related to its stated goals. *People ex rel. Difanis v. Barr,* 83 Ill.2d 191, 46 Ill.Dec. 678, 414 N.E.2d 731 (1980). As the district court noted, there is at least some empirical evidence that gun control legislation may reduce the number of deaths and accidents caused by handguns. *Quilici v. Village of Morton Grove,* 532

F.Supp. at 1179. This evidence is sufficient to sustain the conclusion that Ordinance No. 81-11 is neither wholly arbitrary nor completely unsupported by any set of facts. *People v. Copeland,* 92 Ill.App.3d 475, 47 Ill.Dec. 860, 415 N.E.2d 1173 (1st Dist.1980). Accordingly, we decline to consider plaintiffs' arguments that Ordinance No. 81-11 will not make Morton Grove a safer, more peaceful place.

We agree with the district court that Ordinance No. 81-11: (1) is properly directed at protecting the safety and health of Morton Grove citizens; (2) is a valid exercise of Morton Grove's police power; and (3) does not violate any of appellants' rights guaranteed by the Illinois Constitution.[7]

III

We next consider whether Ordinance No. 81-11 violates the second amendment to the United States Constitution. While appellants all contend that Ordinance No. 81-11 is invalid under the second amendment, they offer slightly different arguments to substantiate this contention. All argue, however, that the second amendment applies to state and local governments and that the second amendment guarantee of the right to keep and bear arms exists, not only to assist in the common defense, but also to protect the individual. While reluctantly conceding that *Presser v. Illinois,* 116 U.S. 252, 6 S.Ct. 580, 29 L.Ed. 615 (1886), held that the second amendment applied only to action by the federal government, they nevertheless assert that *Presser* also held that the right to keep and bear arms is an attribute of national citizenship which is not subject to state restriction. Reichert br. at 36. Finally, apparently responding to the district court's comments that "[p]laintiffs . . . have not suggested that the Morton Grove Ordinance in any way interferes with the ability of the United States to maintain public security . . ." *Quilici v. Village of Morton Grove,* 532 F.Supp. at 1169, Quilici and Reichert argue

[7] We note that *Kalodimos v. Village of Morton Grove,* 81 Ch. 6424 slip op. (Cook County, Ill. Jan. 29, 1982) in which Reichert was one of several plaintiffs, is consistent with our analysis here.

in this court that the Morton Grove Ordinance interferes with the federal government's ability to maintain public security by preventing individuals from defending themselves and the community from "external or internal armed threats." Quilici br. at 12; Reichert br. at 37-38. These are the same arguments made in the district court. Accordingly, we comment only briefly on the points already fully analyzed in that court's decision.

As we have noted, the parties agree that *Presser* is controlling, but disagree as to what *Presser* held. It is difficult to understand how appellants can assert that *Presser* supports the theory that the second amendment right to keep and bear arms is a fundamental right which the state cannot regulate when the *Presser* decision plainly states that "[t]he Second Amendment declares that it shall not be infringed, but this . . . means no more than that it shall not be infringed by Congress. This is one of the amendments that has no other effect than to restrict the powers of the National government . . ." *Presser v. Illinois,* 116 U.S. 252, 265, 6 S.Ct. 580, 584, 29 L.Ed. 615 (1886). As the district court explained in detail, appellants' claim that *Presser* supports the proposition that the second amendment guarantee of the right to keep and bear arms is not subject to state restriction is based on dicta quoted out of context. *Quilici v. Village of Morton Grove,* 532 F.Supp. at 1181-82. This argument borders on the frivolous and does not warrant any further consideration.

Apparently recognizing the inherent weakness of their reliance on *Presser,* appellants urge three additional arguments to buttress their claim that the second amendment applies to the states. They contend that: (1) *Presser* is no longer good law because later Supreme Court cases incorporating other amendments into the fourteenth amendment have effectively overruled *Presser,* Reichert br. at 52; (2) *Presser* is illogical, Quilici br. at 12; and (3) the entire Bill of Rights has been implicitly incorporated into the fourteenth amendment to apply to the states, Reichert br. at 48-52.

None of these arguments has merit. First, appellants offer no authority, other than their own opinions, to support their

arguments that *Presser* is no longer good law or would have been decided differently today. Indeed, the fact that the Supreme Court continues to cite *Presser*, *Malloy v. Hogan*, 378 U.S. 1, 4 n.2, 84 S.Ct. 1489, 1491 n.2, 12 L.Ed.2d 653 (1964), leads to the opposite conclusion. Second, regardless of whether appellants agree with the *Presser* analysis, it is the law of the land and we are bound by it. Their assertion that *Presser* is illogical is a policy matter for the Supreme Court to address. Finally, their theory of implicit incorporation is wholly unsupported. The Supreme Court has specifically rejected the proposition that the entire Bill of Rights applies to the states through the fourteenth amendment. *Adamson v. California*, 332 U.S. 46, 67 S.Ct. 1672, 91 L.Ed. 1903 (1947), *overruled on other grounds*, *Malloy v. Hogan*, 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964); *Palko v. Connecticut*, 302 U.S. 319, 58 S.Ct. 149, 82 L.Ed. 288 (1937); *Twining v. New Jersey*, 211 U.S. 78, 29 S.Ct. 14, 53 L.Ed. 97 (1908).

Since we hold that the second amendment does not apply to the states, we need not consider the scope of its guarantee of the right to bear arms. For the sake of completeness, however, and because appellants devote a large portion of their briefs to this issue, we briefly comment on what we believe to be the scope of the second amendment.

The second amendment provides that "A well regulated Militia being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend. II. Construing this language according to its plain meaning, it seems clear that the right to bear arms is inextricably connected to the preservation of a militia. This is precisely the manner in which the Supreme Court interpreted the second amendment in *United States v. Miller*, 307 U.S. 174, 59 S.Ct. 816, 83 L.Ed. 1206 (1939), the only Supreme Court case specifically addressing that amendment's scope. There the Court held that the right to keep and bear arms extends only to those arms which are necessary to maintain a well regulated militia.

In an attempt to avoid the *Miller* holding that the right to keep and bear arms exists only as it relates to protecting

the public security, appellants argue that "[t]he fact that the right to keep and bear arms is joined with language expressing one of its purposes in no way permits a construction which limits or confines the exercise of that right." Reichert br. at 35. They offer no explanation for how they have arrived at this conclusion. Alternatively, they argue that handguns are military weapons.[8] Stengl's br. at 11-13. Our reading of *Miller* convinces us that it does not support either of these theories. As the Village correctly notes, appellants are essentially arguing that *Miller* was wrongly decided and should be overruled. Such arguments have no place before this court. Under the controlling authority of *Miller* we conclude that the right to keep and bear handguns is not guaranteed by the second amendment.[9]

Because the second amendment is not applicable to Morton Grove and because possession of handguns by individuals is not part of the right to keep and bear arms, Ordinance No. 81-11 does not violate the second amendment.

IV

Finally, we consider whether Ordinance No. 81-11 violates the ninth amendment. Appellants argue that, although the right to use commonly-owned arms for self-defense is not explicitly listed in the Bill of Rights, it is a fundamental right protected by the ninth amendment. Citing no authority which directly supports their contention, they rely on the debates in

[8] Appellants devote a portion of their briefs to historical analysis of the development of English common law and the debate surrounding the adoption of the second and fourteenth amendments. This analysis has no relevance on the resolution of the controversy before us. Accordingly, we decline to comment on it, other than to note that we do not consider individually owned handguns to be military weapons.

[9] A similar conclusion has been reached by numerous other courts. *United States v. Oakes*, 564 F.2d 384 (6th Cir.1977), *cert. denied*, 435 U.S. 926, 98 S.Ct. 1493, 55 L.Ed.2d 521 (1978); *United States v. Warin*, 530 F.2d 103 (6th Cir.), *cert. denied*, 426 U.S. 948, 96 S.Ct. 3168, 49 L.Ed.2d 1185 (1976); *Cody v. United States*, 460 F.2d 34 (8th Cir.), *cert. denied*, 409 U.S. 1010, 93 S.Ct. 454, 34 L.Ed.2d 303 (1972); *Stevens v. United States*, 440 F.2d 144 (6th Cir.1971).

the First Congress and the writings of legal philosophers to establish that the right of an individual to own and possess firearms for self-defense is an absolute and inalienable right which cannot be impinged.

Since appellants do not cite, and our research has not revealed, any Supreme Court case holding that any specific right is protected by the ninth amendment, appellants' argument has no legal significance. Appellants may believe the ninth amendment should be read to recognize an unwritten, fundamental, individual right to own or possess firearms; the fact remains that the Supreme Court has never embraced this theory.[10]

V

Reasonable people may differ about the wisdom of Ordinance No. 81-11. History may prove that the Ordinance cannot effectively promote peace and security for Morton Grove's citizens. Such issues, however, are not before the court. We simply hold the Ordinance No. 81-11 is a proper exercise of Morton Grove's police power and does not violate art. I, § 22 of the Illinois Constitution or the second, ninth, or fourteenth amendments of the United States Constitution. Accordingly, the decision of the district court is

AFFIRMED.

COFFEY, Circuit Judge, dissenting.

The constitutions of the United States and the respective states define and delineate the powers of our various governmental units. As a fundamental principle, if a governing body (federal, state or local) should at any time overstep its limits the judiciary must act as a constitutional check. This was the intent of the framers of the Constitution as evidenced by their dividing the powers and responsibilities of the government into

[10] Appellants also argued, in the district court, that Ordinance No. 81-11 violated the fifth amendment and is unconstitutionally vague. These arguments were not raised in this court.

three separate and distinct branches. Specifically, if a legislative body enacts a law exceeding the constitutional limits of its authority, it is the responsibility and the duty of an independent judiciary to declare it void.

With this principle in mind and conscious of the magnitude of the political and social implications of this case, I am compelled to dissent from my brethren today. It is my opinion that the Village of Morton Grove has improperly legislated beyond the legitimate parameters of its authority.

I base my conclusion upon three grounds. First, Morton Grove Ordinance No. 81-11 is an impermissible attempt by the governing body of the Village to address an issue which the people of the State of Illinois through their elected representatives have deemed to be a matter properly resolved by state action. The state's longstanding and comprehensive regulation and prohibition of handgun possession preempts local legislation on the subject. Second, and closely related to the first, I believe that the Ordinance is invalid under the home rule provisions of the Illinois Constitution in that the regulation of handgun possession is a matter of statewide rather than local concern and the Morton Grove Ordinance contradicts state law regarding the possession of handguns. Third, I believe that Morton Grove Ordinance No. 81-11, as a matter of constitutional law, impermissibly interferes with individual privacy rights. I join others who throughout history have recognized that an individual in this country has a protected right, within the confines of the criminal law, to guard his or her home or place of business from unlawful intrusions. In my view, today's majority decision marks a new nadir for the fundamental principle that "a man's home is his castle." It has been said that the greatest threat to our liberty is from well-meaning, and almost imperceptible governmental encroachments upon our personal freedom. Today's decision sanctions an intrusion on our basic rights as citizens which would no doubt be alarming and odious to our founding fathers. For the above-cited reasons, which I shall discuss in greater detail herein, I respectfully dissent from the opinion of this court.

I.

The Village of Morton Grove's Ordinance No. 81-11 is invalid as the law is an improper attempt by the locality to address a subject which has been deemed by the Illinois Legislature to be exclusively a matter of state concern and control. The state legislature, through extensive and long-standing regulation, has preempted the subject of handgun possession.

Although most frequently addressed in the context of federal versus state enactments, the doctrine of preemption has been recognized as also being applicable to situations involving duplicate areas of state and local legislation. The Illinois Supreme Court has recognized that the existence of long-standing and extensive state regulation of a certain subject matter evidences an implied intent to preempt that field to the exclusion of local municipalities. In *Ampersand, Inc. v. Finley*, 61 Ill.2d 537, 338 N.E.2d 15 (1975), the Illinois Supreme Court acknowledged and approved the following examples contained in the Record of the Proceedings of the Sixth Illinois Constitutional Convention:

> "'Home Rule County adopts an ordinance providing for limits upon rates of interest that may be charged on mortgage and other loans to residents of the county. This ordinance is not valid. The interest-control ordinance is not included in the home-rule powers granted by [section 6(a)] *because of the extensive federal and state regulation of credit institutions.*'
>
> * * * * * *
>
> 'Home Rule City adopts an ordinance limiting the rates that may be charged by the telephone company for local calls. *Long-standing state regulation of utility rates precludes this subject from being considered a matter pertaining to home-rule government and affairs.*'"

Id. 338 N.E.2d at 17 (emphasis added).

The Illinois Appellate Court has also recognized that "where the legislature has adopted a scheme for regulation of a

given subject, local legislative control over such phases of the subject as are covered by state regulation ceases." *Hutchcraft Van Serv. v. City of Urbana, Etc.*, 104 Ill.App.3d 817, 60 Ill.Dec. 532, 536, 433 N.E.2d 329, 333 (1982).[1] The *Hutchcraft* court held that "the legislature has preempted the subject of freedom from unlawful discrimination." *Id.* 60 Ill.Dec. at 537, 433 N.E.2d at 334. In so deciding, the court emphasized that it "would be hard-put to envision a more comprehensive statutory scheme than that contained in the Illinois Human Rights Act." *Id.* Similarly, the subject of the prohibition of handgun possession has been impliedly preempted by the Illinois Legislature because one would be "hard-put to envision a more comprehensive statutory scheme than that" set forth in the state statutes on the subject of handgun possession.

The Illinois Legislature, when enacting and amending chapter 38, set forth an extensive scheme, applying to all persons in Illinois, regulating who may possess firearms, when and where they may possess firearms and the types of firearms they may possess. Possession of a handgun or other firearm by a minor, felon, drug addict or mentally ill or retarded person is forbidden by Illinois statute. Ill.Rev.Stat. ch. 38, § 24-3.1.[2]

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[1] On October 5, 1982, the Illinois Supreme Court denied a petition for leave to appeal the *Hutchcraft* decision, Illinois Supreme Court Docket No. 56635.

[2] Ill.Rev.Stat. ch 38, § 24—3.1 provides in pertinent part:

"24—3.1. Unlawful possession of firearms and firearm ammunition.

(a) A person commits the offense of unlawful possession of firearms or firearm ammunition when:

(1) He is under 18 years of age and has in his possession any firearm of a size which may be concealed upon the person.

(2) He is under 21 years of age, has been convicted of a misdemeanor other than a traffic offense or adjudged delinquent and has any firearms or firearm ammunition in his possession; or

(3) He has been convicted of a felony under the laws of this or any other jurisdiction within 5 years from release from the penitentiary or within 5 years of conviction if penitentiary sentence has not been imposed, and has any firearms or firearm ammunition in his possession; or

(4) He is a narcotic addict and has any firearms or firearm ammunition in his possession; or

(5) He has been a patient in a mental hospital within the past 5 years and has any firearms or firearm ammunition in his possession; or

(6) He is mentally retarded and has any firearms or firearm ammunition in his possession; or

* * *"

Chapter 38, § 24-1(a)(10) of the Illinois statutes already prohibits possession of a handgun by a person on a public street, alley or public lands[3] and the carrying of a concealed handgun under certain circumstances is proscribed by Ill.Rev.Stat. ch. 38, § 24-1(a)(4).[4] Additionally, it is a violation of state law to possess a firearm in an establishment licensed to sell liquor, wine or beer.[5] Moreover, the legislature has banned the possession of specific types of firearms (i.e., machine guns and sawed-off shotguns) in all circumstances but has refrained

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[3] Ill.Rev.Stat. ch. 38, § 24—1(a)(10) recites:

"Unlawful Use of Weapons. (a) A person commits the offense of unlawful use of weapons when he knowingly:

* * * * * * *

(10) Carries or possesses on or about his person, upon any public street, alley, or other public lands within the corporate limits of a city, village or incorporated town, except when an invitee thereon or therein, for the purpose of the display of such weapon or the lawful commerce in weapons, or except when on his land or in his own abode or fixed place of business, any pistol, revolver, stun gun or taser or other firearm."

[4] Ill.Rev.Stat. ch. 38, § 24—1(a)(4) states:

§ 24—1. Unlawful Use of Weapons. (a) A person commits the offense of unlawful use of weapons when he knowingly:

* * * * * * *

(4) Carries or possesses in any vehicle or concealed on or about his person except when on his land or in his own abode or fixed place of business any pistol, revolver, stun gun or taser or other firearm; or

* * * *"

[5] Ill.Rev.Stat. ch. 38, § 24—1(a)(8) states:

"§ 24.1. Unlawful Use of Weapons. (a) A person commits the offense of unlawful use of weapons when he knowingly:

* * * * * * *

(8) Carries or possesses any firearm, stun gun or taser or other deadly weapon in any place which is licensed to sell intoxicating beverages, or at any public gathering held pursuant to a license issued by any governmental body or any public gathering at which an admission is charged, excluding a place where a showing, demonstration or lecture involving the exhibition of unloaded firearms is conducted; or

* * *"

from enacting such a categorical prohibition of handgun possession.[6]

As recognized by the majority, consideration was given to the issue of firearm possession at Illinois' Sixth Constitutional Convention. It is clear from a review of the transcript of the debates that it was the *state's* police power vis-a-vis firearm possession which was the subject of debate. It was noted that Article I, section 22 of the 1970 Illinois Constitution allows the state legislature considerable discretion in the regulation and prohibition of firearm use and possession. It is pursuant to this authority that the State of Illinois enacted and enforces the extensive provisions of chapter 38. Where the legislature after due deliberation has seen fit to outlaw the possession of handguns it has done so. The statutes discussed above constitute the Illinois Legislature's comprehensive promulgation of mandates concerning the issue of gun possession which: (1) prohibits minors, felons, drug addicts and mentally ill and retarded persons from possessing any firearms; (2) proscribes firearm possession on public streets and alleys and in public places; (3) forbids the carrying of a concealed weapon under certain circumstances; (4) prohibits possession of a firearm in a place licensed to sell alcoholic beverages; (5) prohibits without exclusion the possession of a machine gun or a sawed-off shotgun; and (6) expressly authorizes possession of a handgun within the confines of one's home or fixed place of business.

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[6] Ill.Rev.Stat. ch. 38, § 24—1(a)(7) provides:

"§ 24—1. Unlawful Use of Weapons. (a) A person commits the offense of unlawful use of weapons when he knowingly:

* * * * * *

(7) Sells, manufactures, purchases, possesses or carries any weapon from which 8 or more shots or bullets may be discharged by a single function of the firing device, any shotgun having one or more barrels less than 18 inches in length, sometimes called a sawed-off shotgun, or any weapon made from a shotgun whether by alteration, modification or otherwise, if such weapon, as modified or altered, has an overall length of less than 26 inches, or a barrel length of less than 18 inches or any bomb, bombshell, grenade, bottle or other container containing an explosive substance of over one-quarter ounce for like purposes, such as, but not limited to, black powder bombs and Molotov cocktails or artillery projectiles; or

* * *"

A locality such as Morton Grove may address a matter of public concern, such as handgun prohibition, only if the Illinois Legislature has not revealed, either expressly or by implication, an intention to occupy the field to the exclusion of all local legislation. The subject of the prohibition of firearm possession has been so extensively and comprehensively addressed in the Illinois Statutes as to impliedly indicate a positive legislative intent to exclusively occupy the field. Therefore, Illinois municipalities are precluded from enacting provisions prohibiting handgun possession.

Further support for the proposition that the Illinois Legislature intended to peremptorily address the issue of the prohibition of handguns and firearms is found when comparing Ill.Rev.Stat. ch. 38, § 24 (addressed above) with Ill.Rev.Stat. ch. 38, § 83. Section 24, known as the "Deadly Weapons Act," sets forth the qualifications for the lawful ownership and possession of firearms while section 83 directs owners of firearms to obtain "Firearm Owner's Identification Cards" issued by the Illinois Department of Law Enforcement. Section 83 contains a proviso authorizing municipalities to impose greater *restrictions* or *limitations* on firearm registration and possession than those imposed by the legislature under section 83.[7]

Pursuant to section 83, a municipality can enact an ordinance reasonably restricting or confining the use and possession of firearms. A municipality can also require registration of firearm ownership. What the legislature has authorized is limited regulation of firearm possession by local units of government, but not prohibition. Section 83 does not allow a municipality such as Morton Grove to categorically prohibit handgun possession. To limit or restrict involves a circumscription which falls far short of an absolute prohibition.

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[7] Ill.Rev.Stat. ch. 38, § 83—13.1 recites:

"Municipal Ordinance Imposing Greater Restrictions or Limitations

The provisions of any ordinance enacted by any municipality which requires registration or imposes greater restrictions or limitations on the acquisition, possession and transfer of firearms than are imposed by this Act, are not invalidated or affected by this Act."

> "The words 'prohibit' and 'restrict' are not synonymous. They are not alike in their meaning in their ordinary use . . . . 'To restrict is to restrain within bounds; to limit; to confine and does not mean to destroy or prohibit.' "

Forest Land Co. v. Black, 216 S.C. 255, 57 S.E.2d 420, 424 (1950).

If the intention of the Illinois Legislature had been to authorize local prohibition of handgun possession, such intention would have been clearly expressed as was the authorization of local regulation through restriction and limitation. As "[r]egulation is inconsistent with prohibition or exclusion," the proviso to section 83 does not minimize the implied intention of the legislature to exclusively address the issue of handgun possession under section 24. *See Chicago Motor Coach Co. v. City of Chicago*, 337 Ill. 200, 169 N.E. 22, 25 (1929).

The Illinois Legislature, by enacting and amending the extensive provisions of chapter 38, has prohibited certain individuals from possessing firearms, forbidden possession of specific types of firearms and proscribed the possession of firearms in certain places. Despite the Illinois Legislature's refusal to prohibit handgun possession, Morton Grove has seen fit to disregard the legislative intent and has enacted a categorical ban on the possession of handguns, with limited exceptions. In light of long-standing and extensive state control of firearm ownership and possession, Morton Grove Ordinance No. 81-11 impermissibly addresses a subject matter designated by the Illinois Legislature to be the exclusive province of the state legislature.

II.

The powers of Illinois home rule units are not without limitation. The Illinois Constitution provides that a home rule unit, such as Morton Grove, may "exercise any power and perform any function pertaining to its government and affairs . . . . " Ill. Const. Art. VII, § 6(a). However, any exercise of home rule power by a municipality must be "concurrent" with state legislation in the area. Ill. Const. Art. VII, § 6(i).

Morton Grove's Ordinance No. 81-11 is invalid under the Illinois Constitution because the matter of handgun prohibition is not one solely pertaining to local government or local affairs and furthermore, the ordinance is repugnant to and is not concurrent with related state legislation.

Although the powers of home rule units are to be liberally construed, Illinois courts have invalidated ordinances which affected persons and governmental bodies outside the home rule unit. *See Landry v. Smith,* 66 Ill.App.3d 616, 23 Ill.Dec. 636, 639, 384 N.E.2d 430, 433 (1978). Such a limitation on home rule authority was recognized by the Illinois Supreme Court in the *Ampersand* decision noted above.

"[T]he question is not whether the 'pertaining to . . .' language should limit the home rule grant, but rather how extensive the limitation should be.

The local government committee, explaining the intended extent of this limitation, stated in its report to the constitutional convention 'it is clear, however, *that the powers of home rule units relate to their own problems, not to those of the state or the nation.*' "

Ampersand, 338 N.E.2d at 17 (emphasis added).

In its *City of Des Plaines v. Chicago & N.W. Ry. Co.,* 65 Ill.2d 1, 2 Ill.Dec. 266, 357 N.E.2d 433 (1976) decision, the Illinois Supreme Court struck down a municipal noise pollution ordinance holding that it was legislation in an area which did not pertain to the government and affairs of the home rule unit. The *City of Des Plaines* court noted that although "noise pollution may initially appear to be a matter of local concern, an analysis of the problem reveals that noise pollution is a matter requiring regional, if not statewide, standards and controls." *Id.* 2 Ill.Dec. at 266, 357 N.E.2d at 433. Of particular import to the *City of Des Plaines* court was "the question of noise emission from trains in transit which may pass through numerous municipalities en route to their destination." *Id.* 2 Ill.Dec. at 268, 357 N.E.2d at 435.

Practical considerations regarding the Morton Grove Ordinance show why handgun possession is properly a matter of

statewide concern. Like the ordinance invalidated in *City of Des Plaines,* the Morton Grove Ordinance applies not only to residents of the Village, but also is applicable to non-residents traveling through the Village.[8] The Ordinance is obviously designed to prohibit, with limited exceptions, possession of all handguns in Morton Grove whether by residents, non-residents, travelers, etc.

Under the Morton Grove Ordinance, a handgun owner must either take a circuitous route around the Village of Morton Grove or make arrangements to surrender his handgun to the police upon entering the Village and reacquire possession when he leaves.[9] Not only does this infringe upon the citizen's right to travel and, arguably, interfere with interstate commerce but it lends credence to the distinct possibility that gun control in Illinois will be no more than a crazy quilt of conflicting and unenforceable home rule ordinances. In this respect, it is important to remember that "a concomitant effect of this unenforceability is an erosive disrespect for the law which should not be tolerated."[10] Experience has taught mankind that the retention of unenforecable laws which are regularly violated breeds contempt for the law in general. Citizens must not be permitted to pick and choose which laws they wish to obey.

The majority opinion fails to recognize that the subject of handgun possession poses problems that transcend municipal boundaries and is thus not a local affair within the meaning of the Illinois Constitution. The majority flatly and cavalierly states that Illinois has "no overriding state interest in gun control which requires it to retain exclusive control in order to

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[8] Ordinance No. 81—11 § 2(B) recites:

"No person shall possess, in the Village of Morton Grove the following:

* * * * * *

(3) Any handgun, unless the same has been rendered permanently inoperative."

[9] Illinois law permits a handgun owner to transport a handgun by car if the handgun is not immediately accessible to the driver or any other occupant of the vehicle. See Ill.Rev.Stat. ch. 38, §§ 24—1(a)(4) and 24(2)(b)(4).

[10] *Peoples v. Abrahams,* 40 N.Y.2d 277, 286, 386 N.Y.S.2d 661, 353 N.E.2d 574 (1976).

prevent home rule units from adopting conflicting enactments." To support this proposition, the majority relies without discussion on *City of Evanston v. Create, Inc.*, 85 Ill.2d 101, 51 Ill.Dec. 688, 421 N.E.2d 196 (1981).

The *Create* decision, however, is inapposite to the instant case. In *Create*, the Illinois Supreme Court held that an Evanston landlord-tenant ordinance was a valid exercise of Evanston's home rule power granted by the Illinois Constitution. Landlord-tenant ordinances are, by their very nature, matters of local concern since, like zoning ordinances, they apply exclusively to local residents and landowners. Such ordinances are enacted to be specifically suited to the unique needs of a locality's residents. The local governing body involved is keenly and uniquely aware of the needs of the community it serves. The landlord-tenant ordinance in *Create* had no impact on temporary or transitory visitors to Evanston. On the other hand, the Morton Grove handgun ordinance has a far broader scope in that it effects not only Morton Grove residents but also those citizens who merely pass through the Village.

That the prohibition of handgun possession is properly a matter of state concern can be further illustrated as follows: consider the political and administrative difficulties which would arise if Home-Rule Unit A were to pass an ordinance banning the possession of all handguns and Home-Rule Unit B were to pass an ordinance making handgun possession mandatory. What is outlawed in one municipality becomes mandatory in another. The Illinois Legislature never intended to permit the possibility of a hodgepodge of conflicting home rule enactments when it adopted Ill.Rev.Stat. ch. 38 to address the statewide issue of the prohibition of handgun ownership.

An analogy between the subject of gun control and the field of children's health care further highlights the propriety of statewide uniformity and enforcement. Due to difficulties in enforcement and the need for statewide uniformity, many states have passed legislation requiring the immunization of school age children against contagious diseases. *See, e.g.*, Ill.Rev.Stat. ch. 111½, §§ 22.11 and 22.12. If local authorities were allowed

to pass conflicting ordinances regarding the vaccination of school age children, the enforcement of these ordinances in multi-municipal school districts would be extremely difficult, if not impossible.

The Illinois Legislature has not enacted a categorical prohibition of handgun possession, even though it was the view of the framers of the Illinois Constitution that firearm possession was a matter of statewide concern and that the state legislature had the power to ban handgun possession, if it so desired. In the debates at the Sixth Illinois Constitutional Convention which adopted the present Illinois Constitution, Delegate Foster, speaking for the majority explained:

> "We feel that . . . the state would have the right to prohibit some classes of firearms, such as war weapons, handguns, or some other category.
>
> * * * * * *
>
> [I]t is the position of the majority that under the police power of the state, the legislature would have the authority, for example, to forbid all handguns . . . [and] it is still the position of the majority that short of an absolute and complete ban on the possession of all firearms, this provision would leave the legislature free to regulate the use of firearms in Illinois."

3 Proceedings of Sixth Illinois Constitutional Convention at 1688, 1818 and 1718.

Delegate Foster's comments demonstrate that it was recognized by the Convention that firearm possession is a matter of state concern. Despite the clear meaning of Foster's words, the majority in the instant case concludes, based on the Delegate's remarks, that the framers of the Illinois Constitution "envisioned that *local governments* might exercise their police power to restrict, or prohibit, the right to keep and bear arms." (emphasis added). The fallacy of the majority's logic is obvious; Delegate Foster said that "the *state* would have the right to prohibit . . . handguns" and "that under the police power of the *state, the legislature* would have the authority, for example, to forbid all handguns . . . ." (emphasis added). In

fact, Foster's remarks directly contradict, rather than support, the majority's conclusion that a local municipality such as Morton Grove may prohibit handgun possession; clearly, Foster's view was that handgun possession was a matter of statewide concern best addressed by state legislation.

The Morton Grove Ordinance prohibiting handgun possession is invalid because it does not act concurrently with the Illinois Legislature's extensive regulation of firearm registration and possession. Black's Law Dictionary defines "concurrent" as "united in agreement." BLACK'S LAW DICTIONARY 263 (5th Ed. 1979). Morton Grove's prohibition of handgun possession is not "united in agreement" with the state statutory scheme but is fundamentally at odds with the extensive state regulation of handgun possession. The state legislation is regulatory while Morton Grove's enactment is prohibitory.

The state legislature and the Morton Grove Ordinance approach the subject of gun control from opposite directions. The legislature started from the point that all persons may possess handguns and then proceeded to regulate and restrict specific types of guns, rather than banning handguns and then authorizing certain persons or classes to possess them. This reveals an implied intent to extend to all citizens a privilege to possess handguns except where, by operation of *state law,* that privilege is circumscribed in the interests of the common good. Morton Grove, in contrast, takes the opposite approach by prohibiting all handguns and then grants permission to possess handguns to limited classes of persons. Thus, the Morton Grove Ordinance is invalid as it is fundamentally at odds with the legislature's will to allow Illinois citizens to possess handguns, except in very limited circumstances, because "the test of concurrent authority . . . is the absence of conflict with the legislative will." *Maryland & D.C. Rifle & Pistol Ass'n., Inc. v. Washington,* 422 F.2d 123, 130 (D.C.Cir. 1971).

The second reason Morton Grove's Ordinance does not operate concurrently with state law is even more significant. The ordinance is invalid to the extent that it prohibits what is expressly permitted by state statute. "To be sure, a municipal regulation cannot permit an act which the statute forbids, or forbid an act which the statute permits." *Id.*

A number of sections of chapter 38 of the Illinois Statutes contain exceptions to the general provisions which ban the possession of handguns under certain circumstances. Of particular significance are those statutory sections which expressly allow for the possession of handguns by individuals when in their homes, in their fixed places of business or upon their land.[11] The Illinois Legislature has expressly authorized the citizens of Illinois to carry handguns while present in certain locations. Such authorization is directly nullified by Morton Grove Ordinance No. 81-11.

A municipal ordinance providing for the registration of firearms was attacked in *Brown v. City of Chicago*, 42 Ill.2d 501, 250 N.E.2d 129 (1969). Although the Illinois Supreme Court noted that the legislature had not preempted the registration aspect of the subject of gun control, the court did note that the ordinance would be struck down if it contradicted the provisions of the statute. The registration ordinance was upheld because there was "no inconsistency or repugnancy" between it and statutory provisions relating to firearm ownership registration. *Id.* at 250 N.E.2d 129. There can be no doubt as to the repugnancy of Morton Grove Ordinance No. 81-11 as it directly contradicts an authorization recited in the state statutes. Additionally, the ordinance is inconsistent with the state regulatory scheme as prohibition is inconsistent with regulation. I would find no problem with Morton Grove requiring handgun registration similar to that involved in *Brown*. Registration and prohibition, by their very nature, seek to achieve different goals. Regulation through registration allows possession subject to reasonable limits while prohibition mandates an outright ban on possession.

As Morton Grove has impermissibly acted under its home rule powers vis-a-vis Ordinance No. 81-11, it is the obligation of this court to strike down the municipal enactment. Clearly, the creation of a *uniform* regulatory scheme concerning the possession of handguns is a matter of statewide, or even federal concern, which should not be disrupted by permitting this type of contradictory local action.

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[11] *See, e.g.*, Ill.Rev.Stat. ch. 38, §§ 24—1(a)(4), (10).

III.

I find today's decision particularly disturbing as it sanctions governmental action which I feel impermissibly interferes with basic human freedoms. I cannot let this opportunity pass without expressing my concern with the erosion of these rights.

The majority cavalierly dismisses the argument that the right to possess commonly owned arms for self-defense and the protection of loved ones is a fundamental right protected by the Constitution. Justice Cardozo in *Palko v. Connecticut*, 302 U.S. 319, 325, 58 S.Ct. 149, 151, 82 L.Ed. 288 (1937), defined fundamental rights as those rights "implicit in the concept of ordered liberty." Surely nothing could be more fundamental to the "concept of *ordered* liberty" than the basic right of an individual, within the confines of the criminal law, to protect his home and family from unlawful and dangerous intrusions.

Article I, section 22 of the Illinois Constitution provides that subject to the "police power," the right of an individual to bear arms shall not be infringed. The United States Supreme Court has noted the difficulty in attempting to outline the parameters of a state's legitimate police power. In *Berman v. Parker*, 348 U.S. 26, 75 S.Ct. 98, 99 L.Ed. 27 (1954), addressing the concept of "police power," the Supreme Court stated that "an attempt to define its reach or trace its outer limits is fruitless, for each case must turn on its own facts." *Id.* at 33, 75 S.Ct. at 102. The term is neither "abstractly nor historically capable of complete definition." *Id.* In enacting Ordinance No. 81-11, Morton Grove has gone beyond the "outer limits" of its legitimate police powers.

In *Haller Sign Works v. Physical Culture Training School*, 249 Ill. 436, 94 N.E. 920 (1911), the Illinois Supreme Court recognized that it is the responsibility of the courts to determine when constitutional limits have been exceeded in the enactment of police power legislation. It is the duty of the courts to determine whether there has been an "unreasonable invasion of private rights." *Id.* 94 N.E. at 922.

> "Necessarily there are limits beyond which legislation cannot constitutionally go in depriving individ-

> uals of their natural rights and liberties. To determine where the rights of the individual end and those of the public begin is a question which must be determined by the court."

Id. 94 N.E. at 927.

In today's decision this court has refused to take cognizance of the natural right of an individual, within the confines of the criminal law, to protect his home and family from unlawful and dangerous intrusions. It is my opinion that Morton Grove Ordinance No. 81-11 impermissibly interferes with the rights of Illinois citizens to guard their personal security, subject to the limits of the criminal law, and that it is the duty of this court to so declare.

The court today has also refused to recognize the tremendous impact of Morton Grove Ordinance No. 81-11 on personal privacy rights. There is no doubt that the right to one's privacy is afforded constitutional protection. The United States Supreme Court has repeatedly recognized a right to privacy implicit in the federal constitution and Article I, section 6, of the Illinois Constitution expressly establishes a right to privacy. The Illinois provision has been interpreted by some members of the Illinois Supreme Court as creating a direct right to freedom from invasions of privacy by government or public officials. *See Stein v. Howlett,* 52 Ill.2d 570, 289 N.E.2d 409, 411, *appeal dismissed,* 412 U.S. 925, 93 S.Ct. 2750, 37 L.Ed.2d 152 (1973).

The Morton Grove Ordinance, by prohibiting the possession of a handgun within the confines of the home, violates both the fundamental right to privacy and the fundamental right to defend the home against unlawful intrusion within the parameters of the criminal law. There is no area of human activity more protected by the right to privacy than the right to be free from unnecessary government intrusion in the confines of the home.

The unique importance of the home from time immemorial has been amply demonstrated in our constitutional jurisprudence. Among the enumerated rights in the Bill of Rights are the Third Amendment's prohibition of quartering of troops in a

private house in peace-time and the right of citizens to be "secure in their . . . houses . . . against unreasonable searches and seizures . . . " guaranteed by the Fourth Amendment. As early as 1886, the United States Supreme Court recognized that the Fifth Amendment protects against all governmental invasions "of the sanctity of a man's home and the privacies of life." *Boyd v. United States,* 116 U.S. 616, 630, 6 S.Ct. 524, 532, 29 L.Ed. 746 (1886). The First Amendment had been held to encompass the rights to "privacy and freedom of association in the home." *Moreno v. United States Dep't of Agriculture,* 345 F.Supp. 310, 314 (D.D.C. 1972), *aff'd,* 413 U.S. 528, 93 S.Ct. 2821, 37 L.Ed.2d 782 (1973).

In *Stanley v. Georgia,* 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed.2d 542 (1969), the Supreme Court overturned a state conviction for possession of obscene material, holding "that the First and Fourteenth Amendments prohibit making the private possession of obscene material a crime." The Supreme Court had previously held that obscenity is not protected by the First Amendment, but in *Stanley* the Court made a distinction between commercial distribution of obscene matter and the private possession of such materials in the home and held the Georgia statute unconstitutional because it prohibited the possession of such materials in the home. The Court recited:

"For also fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy."

Id. at 564, 89 S.Ct. at 1247.[12]

The Court has made it clear that its *Stanley* decision was not based on the idea that obscene matter is itself protected under the right of privacy. Rather, the focus in *Stanley* was on the fact that the activity prohibited by the Georgia statute occurred in the privacy of the home. In *United States v. Reidel,* 402 U.S. 351, 356, 91 S.Ct. 1410, 1412, 28 L.Ed.2d 813 (1971), the Court rejected the argument that commercial distribution of

[12] I am aware of Justice Marshall's comments contained in footnote No. 11 of the *Stanley* decision. I believe however, as noted herein, that subsequent decisions of the Court have divested the footnote of any significance vis-a-vis this court's review of Morton Grove Ordinance No. 81—11.

pornography is constitutionally protected and held that the "focus" of *Stanley* was "on freedom of mind and thought and on the privacy of one's home." Subsequently, the Court in *United States v. Orito*, 413 U.S. 139, 142, 93 S.Ct. 2674, 2677, 37 L.Ed.2d 513 (1973) stated "the Constitution extends special safeguards to the privacy of the home" and there exists a "myriad" of activities which may be prohibited in public but which may be lawfully conducted within the privacy and confines of the home.

Most importantly, the Supreme Court in *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 66, 93 S.Ct. 2628, 2639, 37 L.Ed.2d 446 (1973), held that *Stanley* was decided "on the narrow basis of the 'privacy of the home' which was hardly more than a reaffirmation that *'a man's home is his castle.'*" (emphasis added).

Privacy in the home is a fundamental right under both the federal and Illinois Constitutions. This does not mean, of course, that a person may do anything at anytime as long as the activity takes place within a person's home. Instead, the right to privacy is limited in two important respects. First, the Supreme Court strictly limited its *Stanley* holding to possession for purely private, noncommercial use in the home. Second, as noted in *Stanley*, the right to privacy must yield when it seriously interferes with the public welfare. The government bears a heavy burden when attempting to justify an expansion, as in gun control, of the "limited circumstances" in which intrusion into the privacy of a home is permitted.

Morton Grove has not met that heavy burden. Without question, the state may, should and has placed reasonable restrictions on the possession of handguns outside one's home to protect the public welfare. However, Morton Grove's prohibition of handgun possession within the confines of a person's own home has not been shown to be necessary to protect the public welfare and thus violates the fundamental right to privacy.

The right to privacy is one of the most cherished rights an American citizen has; the right to privacy sets America apart from totalitarian states in which the interests of the state prevail

over individual rights. A fundamental part of our concept of ordered liberty is the right to protect one's home and family against dangerous intrusions subject to the criminal law. Morton Grove, acting like the omniscient and paternalistic "Big Brother" in George Orwell's novel, "1984", cannot, in the name of public welfare, dictate to its residents that they may not possess a handgun in the privacy of their home. To so prohibit the possession of handguns in the privacy of the home prevents a person from protecting his home and family, endangers law-abiding citizens and renders meaningless the Supreme Court's teaching that "a man's home is his castle."

IV.

In summary, I believe a truly independent judiciary must exercise its powers with discretion and reservation, giving due deference to the other branches of government. Our judicial responsibility, however, obligates us to declare an act by another governmental unit to be void if we believe the enacted law is contrary to the principles of the Constitution. Because I believe that the Morton Grove Ordinance as enacted is contrary to the principles of the Constitution, I must respectfully dissent from the opinion of this court.

United States District Court,

N. D. ILLINOIS, E. D.

VICTOR D. QUILICI,

Plaintiff,

v.

VILLAGE OF MORTON GROVE,

Defendant.

ROBERT STENGL, *et al.*,

Plaintiffs,

v.

VILLAGE OF MORTON GROVE, *et al.*,

Defendants.

GEORGE L. REICHERT, *et al.*,

Plaintiffs,

v.

VILLAGE OF MORTON GROVE,

Defendant.

Nos. 81 C 3432, 81 C 4086 and 81 C 5071.

Dec. 29, 1981.

MEMORANDUM OPINION AND ORDER

DECKER, District Judge.

This is a civil action challenging the constitutionality of a gun control ordinance passed by the Trustees of the Village of Morton Grove. On June 8, 1981, the Morton Grove Board of Trustees enacted Ordinance # 81-11, entitled "An Ordinance Regulating the Possession of Firearms and Other Dangerous

Weapons." (A copy of the ordinance is attached as an appendix.) In part, the ordinance provides that "no person shall possess, in the Village of Morton Grove . . . [a]ny handgun, unless the same has been rendered permanently inoperative." The ordinance specifies various limited exceptions for certain individuals, such as peace officers, prison officials, and members of the armed forces and national guard. The ordinance also exempts licensed gun collectors and provides that handgun owners are free to retain their operative handguns for recreational use, as long as the guns are kept and used on the premises of licensed gun clubs and certain other rules are met. Violation of the ordinance is punishable by fines of up to $500.00, and incarceration for up to six months for repeat offenders.

Consolidated here are three civil suits, filed shortly after the enactment of the ordinance, by several residents of Morton Grove.[1] The plaintiffs have alleged that the enforcement of the ordinance, which has been stayed pending this court's ruling on its validity, would violate both the Illinois and United States constitutions. Both sides have moved for summary judgment on the issue of whether the ordinance, on its face, violates article 1, section 22 of the Illinois Constitution, or the Second, Fifth, Ninth or Fourteenth Amendments to the United States Constitution. Because the state constitutional issue is potentially dispositive, the court will first address the validity of Ordinance # 81-11 under the Illinois Constitution.

The Right to Arms Under the Illinois Constitution

In 1970, a right to arms clause was included in the Illinois Constitution for the first time. Article 1, section 22 provides:

Right to Arms

> Subject only to the police power, the right of the individual citizen to keep and bear arms shall not be infringed.

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[1] The four named plaintiffs, Victor D. Quilici, Robert Stengl, George L. Reichert, and Robert E. Metler, all allege that they own handguns as defined in the ordinance and would be adversely affected if the ordinance were upheld.

The plaintiffs have contended that Morton Grove's ordinance impermissibly infringes upon that right, while the defendant claims that its action represents a valid exercise of the police power. Central to the court's resolution of this controversy is a determination of the meaning of section 22, itself.

Section 22, on its face, requires a reconciliation of two competing notions of individual right and legislative prerogative. On one hand, it clearly recognizes the constitutional right of the individual "to keep and bear arms," and provides that the right "shall not be infringed." Yet, at the same time, the section expressly sanctions "constitutional infringements" of the right pursuant to the "police power," which is generally understood to mean the power of state and local governments to regulate *and even prohibit* conduct which is perceived to be inimical to the safety, health and welfare of society. *People v. Warren,* 11 Ill.2d 420, 424-25, 143 N.E.2d 28 (1957). *Accord, Drysdale v. Prudden,* 195 N.C. 722, 143 S.E. 530, 536 (1928); *Liquor Control Commission v. City of Calumet City,* 28 Ill.App.3d 279, 283, 328 N.E.2d 153 (1st Dist. 1975).

The plaintiffs have advocated a broad and liberal interpretation of the individual right to keep and bear arms, and a restrictive view of the scope of the police power. That power, they insist, must not be interpreted in a manner which would allow it to circumscribe the individual right contained in section 22. The defendant disagrees. Morton Grove argues that since the individual right in section 22 is made expressly subject to the broad power of the legislature, that right should be construed narrowly, and the police power should be interpreted according to its usual and customary meaning, free from artificially-imposed restrictions. Because the language contained in section 22 itself offers no clue as to the proper reconciliation of these two competing concepts, the court finds it necessary to examine the provision's constitutional history, the source traditionally relied upon for the clarification of ambiguous constitutional provisions. *See Cosentino v. County of Adams,* 82 Ill.2d 565, 46 Ill.Dec. 116, 413 N.E.2d 870 (1980); *Client Follow-Up Co. v. Hynes,* 75 Ill.2d 208, 28 Ill.Dec. 488, 390 N.E.2d 847 (1979); *Wolfson v. Avery,* 6 Ill.2d 78, 126

N.E.2d 701 (1955); *Davis v. Attic Club,* 56 Ill.App.3d 58, 13 Ill.Dec. 811, 371 N.E.2d 903 (1st Dist. 1977).

While it is true that there are several sources upon which one might draw in reviewing the constitutional history of a provision, "the practice of consulting the debates of the members of the convention . . . has long been indulged in by courts as aiding to a true understanding of the meaning of provisions that are thought to be doubtful." *Burke v. Snively,* 208 Ill. 328, 344-45, 70 N.E. 327 (1904), quoted with approval in *Coalition for Political Honesty v. State Board of Elections,* 65 Ill.2d 453, 467, 3 Ill.Dec. 728, 359 N.E.2d 138 (1976); *Wolfson v. Avery,* 6 Ill.2d at 88, 126 N.E.2d 701; *Davis v. Attic Club,* 56 Ill.App.3d at 67-70, 13 Ill.Dec. 811, 371 N.E.2d 903. In this case, the court has found the delegates' debate on section 22 helpful to a meaningful reconciliation of the individual's right to arms and the state's broad police powers.

Prior to the delegates' floor debate on section 22, the Bill of Rights Committee voted twelve to three to include the following right to arms provision in the new constitution:

> Subject only to the police power of the State, the right of the individual citizen to keep and bear arms shall not be infringed.

Vol. 6, *Record of Proceedings, Sixth Illinois Constitutional Convention* [hereinafter *"Proceedings"*] 84.[2] Leonard Foster, the spokesman for the majority of the committee, was responsible for explaining the provision to the delegates. Although his explanation necessitated a narrow construction of the individual's right to arms, Foster suggested a resolution of the apparent tension between the section's terms. According to Foster, section 22 stood only for the limited right of the individual citizen to keep and bear "some form" of firearm; and as long as the government, in the exercise of its police power, did not totally prohibit the possession of *all* firearms, the right

[2] In order to avoid any possible question as to whether the police power could be exercised by local governments, the delegates ultimately amended the proposed provision to delete the words "of the State" from the clause "Subject only to the police power." No challenge has been raised in this case regarding Morton Grove's ability as a local government to exercise that power.

provided for in section 22 was not violated. 3 *Proceedings* at 1687, 1689, 1718 (remarks of delegate Foster).

Although the right to arms described by delegate Foster might have appeared on its face to be evanescent, Foster told the convention that under the 1870 Illinois Constitution, which contained no right to arms provision at all, a total prohibition of firearms was possible, and that the proposed section was designed to do no more than eliminate that possibility:

> It could be argued that, in theory, the legislature now has the right to ban all firearms in the state as far as individual citizens owning them is concerned. That is the power which we wanted to restrict—an absolute ban on all firearms. Nothing further.

3 *Proceedings* at 1688. Later in the debate, Foster emphasized just how limited the proposed right to arms would be:

> [S]hort of an absolute and complete ban on the possession of all firearms, this provision would leave the legislature free to regulate the use of firearms in Illinois.
>
> * * * * * *
>
> It is the position of the majority that under the police power of the state, the legislature would have the authority, for example, to forbid all handguns.

3 *Proceedings* at 1718 (order inverted). Foster characterized the committee as "very reluctant" to include any right to arms provision at all in the new constitution, 3 *Proceedings* at 1687, and indicated clearly in his remarks that once the committee finally decided to include such a provision, that provision was intended to be construed narrowly, and fully subject to the broad police power.

During the debate, several of the delegates questioned Foster specifically with respect to the meaning of the term "police power" in the context of section 22, and any limitations which section 22 might impose upon the legislature. Foster was unequivocal: Section 22 would restrain no exercise of the

legislature's power short of an absolute ban on all firearms. That statement prompted the following exchange:

MR. FAY: Well, is that the extent of it?

MR. FOSTER: This is the extent of it, Mr. Fay.

* * * * * *

MRS. LEAHY: For a while, I had thought that perhaps the proposal might be a nullity—that you granted the right, but it could be taken away under the police power. According to your answer to the question asked by Mr. Fay, there is one exception to that police power [being] exercised, and that would be the total taking away?

MR. FOSTER: Right.

* * * * * *

MRS. LEAHY: Well, then you have total abolition and total right; and somewhere in between there, there are gradations.

MR. FOSTER: No, we don't have total abolition versus total right. We have total abolition versus limited right—right limited by the police power extending up to but not including total abolition.

MRS. LEAHY: Anything short of total abolition [that] is justified as reasonable for the safety, then, would be approved under your proposal?

MR. FOSTER: Yes, in the opinion of the majority.

3 *Proceedings* at 1688. Clearly, section 22 was presented to the delegates as recognizing a narrow individual right which was subject to substantial legislative control.

From a review of the remarks of the delegates which followed Foster's explanation, it is clear that whatever their individual feelings about the right to arms, there was very little disagreement about the effect of making that right subject to the police power. As the debate progressed, two principal views emerged with respect to the meaning of the right to arms provision in section 22. One group of delegates supported the section, and seemed to adopt the view of the majority of the

committee that section 22 represented only a narrow right, and limited virtually no exercise of the police power short of a total ban on all firearms. Typical of this group was delegate Durr:

> [H]and guns are by far and away the problem in this country and in this state, where there is a problem with firearms or arms of any kind. This document [Section 22] does not in any way attempt or intend, as I read it and as I suspect the courts would read it—and I've done some research on this—would not restrict the state or the county or the city or any other government within the confines of a reasonable—that is the key word, reasonable—control over hand guns. And I submit to you that that would include the prohibition, if they reasonably determined that hand guns were an undue hazard.

3 *Proceedings* at 1717-18. See also 3 *Proceedings* at 1709 (remarks of delegate Elward: "the plain language of the majority proposal . . . denies almost nothing that the General Assembly or any city council could do in the future.")

A second group of delegates saw little distinction between a limited right to keep "some form" of arms, and no right to arms at all. While in apparent agreement with the committee view that section 22 provided very little protection of an individual's rights in the face of a proper exercise of the police power, this group criticized the majority provision as being totally illusory. *E.g.,* 3 *Proceedings* at 1697 (remarks of delegate Weisberg). Some of those delegates favored no right to arms provision at all, and voted for the minority proposal to exclude any right to arms provision from the constitution. *E.g.,* 3 *Proceedings* at 1713 (remarks of delegate Tomei), 1720 (remarks of delegate Thompson). Others supported a strong constitutional right to arms, and eventually voted for the majority proposal, but only after making it clear to the convention that they felt it too weak. *See* 3 *Proceedings* at 1708 (remarks of delegate Friedrich: "Frankly, I don't think what we're putting in . . . is strong enough. . . . [M]any of [the states'] constitutional provisions are much more enabling than the one that's proposed here."); 1704 (remarks of Father

Lawlor, proposing, *inter alia*, the removal of the term "police power" from the provision). Most of those delegates acknowledged that the inclusion of the term "police power" substantially undercut the right to arms. To the extent that one looks to the convention debate for assistance in reconciling the conflict between the right to arms and the exercise of the police power, the debate clearly supports a narrow construction of the individual right.

The plaintiffs, in urging the court to reject a narrow construction of the right to arms, have sharply criticized any significant reliance on the constitutional debates. First, they argue that emphasis on the debates is misplaced because the true inquiry in resolving constitutional ambiguities is to determine "the understanding . . . by the voters who, by their vote, have given life to the product of the convention." *Cosentino v. County of Adams*, 82 Ill.2d at 569, 46 Ill.Dec. 116, 413 N.E.2d 870. *See also Client Follow-Up Co. v. Hynes*, 75 Ill.2d at 222, 28 Ill.Dec. 488, 390 N.E.2d 847; *Wolfson v. Avery*, 6 Ill.2d at 88, 126 N.E.2d 701. *But see Winokur v. Rosewell*, 83 Ill.2d 92, 100-102, 46 Ill.Dec. 671, 414 N.E.2d 724 (1980) (relying on framers' intent to clarify ambiguous constitutional provision).[3] To determine the voters' understanding, the plaintiffs have requested the court to consider such additional sources as: (1) The Official Explanation of section 22 which was provided to the voters prior to ratification of the constitution; (2) Newspaper articles written at around the time of the ratification vote discussing the right to arms provisions; and (3) The "plain meaning" which ordinary voters might have attributed to the term "police power." None of those sources, however, meaningfully addresses the reconciliation of individual right and legislative power which section 22 requires.

[3] It must be emphasized that the cases relied upon by the plaintiffs do not support outright rejection of the delegates' debate as a source of information, but only suggest the consideration of alternative sources as an aid to resolving constitutional ambiguities. *See Client Follow-Up Co. v. Hynes*, 75 Ill.2d at 220, 28 Ill.Dec. 488, 390 N.E.2d 847: "When the meaning of provisions of the constitution are in doubt, it is appropriate to consult the debates of the delegates to the constitutional convention to ascertain the meaning which they intended to give those provisions." *See also, Wolfson v. Avery*, 6 Ill.2d at 88, 126 N.E.2d 701.

The "Official Text of the Proposed 1970 Illinois Constitution with Explanation" provides:

> Section 22 *Right to Arms*
>
> Subject only to the police power, the right of the individual citizen to keep and bear arms shall not be infringed.
>
> *Explanation*
>
> This new section states that the right of the citizen to keep and bear arms cannot be infringed, except as the exercise of this right may be regulated by appropriate laws to safeguard the welfare of the community.

Even taking the "Official Explanation" into consideration, the court is unconvinced of the plaintiffs' position. Far from reconciling the tension between the exercise of the individual right and the exercise of the police power, the above explanation begs the question. Like the text of the section itself, the explanation offers no clue as to the limits on the police power. *See Davis v. Attic Club,* 56 Ill.App.3d at 67, 13 Ill.Dec. 811, 371 N.E.2d 903 (rejecting reliance on the "Official Explanation of the 1970 Proposed Constitution" as being too conclusory and superficial).

Similarly, the court can find no meaningful reconciliation of the two concepts in the Chicago Tribune article of December 13, 1970, which referred to the new right only sketchily as a "new right . . . to keep and bear arms," and summarized section 22 as providing "a guarantee of the individual's right to own firearms." No attention at all is devoted to the critical issue of interpretation as to the limit on the police power.

Finally, the suggestion that the right to arms warrants a liberal reading because that is how "the people" would read it must be rejected. According to this argument, the voters did not understand the full import of the term "police power" when they ratified the constitution. Instead, they most likely thought that they were ratifying a broad right to arms, one which would not tolerate a total handgun ban. Therefore, the plaintiffs argue

that the court should give effect to the public's perception of the right rather than its actual meaning. The court cannot agree. Section 22 says explicitly that the individual right is subject to the police power. The Illinois Supreme Court has defined that term to include the power "to prohibit." *People v. Warren,* 11 Ill.2d at 424-25, 143 N.E.2d 28. Sound principles of construction require that "in those instances in which [the Illinois Supreme Court], prior to the adoption of the constitution of 1970, has defined a term found therein, that it be given the same definition, unless it is clearly apparent that some other meaning was intended." *Bridgewater v. Hotz,* 51 Ill.2d 103, 109, 281 N.E.2d 317 (1972). The plaintiffs' arguments to the contrary are incorrect.

The plaintiffs' final attack on the debates concerns the conflict between certain language in the Bill of Rights Committee majority report on section 22 and the position taken by the committee on the floor of the convention. The plaintiffs refer the court to the following language in the report:

> The substance of the right [contained in Section 22] is that a citizen has the right to possess and make reasonable use of arms that law-abiding persons commonly employ for purposes of recreation or the protection of person and property. Laws that attempted to ban all possession or use of such arms, or laws that subjected possession or use of such arms to regulations or taxes so onerous that all possession or use was effectively banned, would be invalid."

6 *Proceedings* at 87, *citing People v. Brown,* 253 Mich. 537, 541-42, 235 N.W. 245, 246-47 (1931); *State v. Duke,* 42 Tex. 455, 458 (1875); *In re. Brickey,* 8 Idaho 597, 70 P. 609 (1902); *People v. Zerillo,* 219 Mich. 635, 189 N.W. 927 (1922); *State V. Kerner,* 181 N.C. 574, 107 S.E. 222(1921). The plaintiffs argue first that those cases, decided under other states' constitutions, support their conclusion that the police power should be read restrictively. Second, they argue that the mere fact that those cases were included in the committee report serves as an indication of the delegates' intent that the police power should

be narrowly constructed, contrary to the intent expressed on the convention floor. The court rejects both of these arguments.

While the language used in some of these cases supports the text used in the report, the cases themselves were decided under distinctly different constitutional provisions. *In re Brickey,* for example, was decided 80 years ago, under a state constitutional provision which stated:

> The people have the right to bear arms for security and defense, but the legislature shall regulate the exercise of this right by law.

70 P. at 609. In its opinion in *Brickey,* the Supreme Court of Idaho held only that the inclusion of the term "regulate" in the Idaho Constitution did not permit the legislature to prohibit persons from carrying firearms. *Id.* The framers of the Illinois Constitution did not choose to use the term "regulate" to limit the Illinois right to arms. Instead, they used the expression "subject to the police power," which the Illinois Supreme Court had already held to include the power to prohibit. *See People v. Warren, supra.* In fact, the Illinois Supreme Court had already stated that the police power specifically included the power to prohibit firearms. *Biffer v. City of Chicago,* 278 Ill. 562, 116 N.E. 182 (1917). By including an express police power limitation, the Illinois right to arms provision is simply different from those of the other states.

A further distinction between section 22 and the other provisions is that the Illinois right to arms provision has a clear constitutional history which supports a narrow reading of the right to arms. No such constitutional history is mentioned in the two-paragraph *Brickey* opinion, or in the other cases cited by the plaintiffs. *E.g., State v. Kerner, supra.* For these reasons, the court finds the cases decided under other states' constitutional provisions unpersuasive in this case.

Although the cases decided under other states' constitutions were mentioned in the committee report, little can be concluded merely from the fact of their mention in the report. For, on the very page following its citation of *In re Brickey,* the

report quoted with approval the following language from the Illinois Supreme Court opinion in *Biffer v. City of Chicago:*

> It is clear, under the authorities, that the sale of deadly weapons may be absolutely prohibited under the police power of the State, and to do this in no way conflicts with the provisions of the constitution of the United States and of various state constitutions that "the people have a right to bear arms for their defense and security."

278 Ill. at 570, 116 N.E. 182. 6 *Proceedings* at 88. The majority report then added:

> Because arms pose an extraordinary threat to the safety and good order of society, the possession and use of arms is subject to an extraordinary degree of control under the police power.

6 *Proceedings* at 88. Contrary to the plaintiffs' arguments, the views contained in the committee report are certainly consistent with the narrow reading of the right to arms expressed so clearly by the delegates on the floor of the convention.[4] Nothing in the committee report persuades the court to disregard the clear expression of the delegates' intent contained in the debates.

After carefully reviewing the constitutional history of section 22, including the actual language used in the provision, the text of the convention debates, the committee report, and the other sources discussed above, the court concludes that the right to arms in Illinois is so limited by the police power that a ban on handguns does not violate that right. On at least five occasions, the convention debates indicated that such a ban would not be unconstitutional, 3 *Proceedings* at 1687, 1689, 1693, 1718, and the court agrees with that assessment. Furthermore, the court concludes that as long as a law does not totally ban all firearms, it must only qualify as a valid exercise of the police power in order to survive constitutional challenge under

[4] Similarly, the report's failure to list a handgun ban among its illustrations of such applications of the police power is not necessarily inconsistent with the committee's view during the debate. The report explicity indicated that its list of illustrations was intended to be non-exhaustive.

section 22. Therefore, the narrow question remaining for the court is whether Morton Grove's enactment was a proper exercise of the police power.

By banning the possession of handguns by private citizens within its borders, Morton Grove has gone further than either the state legislature or any other municipality in gun regulation, either before or after the inclusion of a right to arms in the Illinois Constitution. Therefore, it is necessary to give extremely careful consideration to the permissible limits of the police power as applied to the sweeping provisions of this ordinance.

Despite the fact that no other court has been called upon to consider a handgun ordinance of this scope, this court, when considering the police power of the state or municipality, is not writing on a blank slate. The Illinois Supreme Court has recently considered and restated the guiding principles by which this court must be led in its review of an enactment under the police power. *See City of Carbondale v. Brewster,* 78 Ill.2d 111, 34 Ill.Dec. 832, 398 N.E.2d 829 (1979), *appeal dismissed,* 446 U.S. 931, 100 S.Ct. 2145, 64 L.Ed.2d 783 (1980). The *Carbondale* court stated the following:

> The police power may be exercised to protect the public health, safety, morals, and general welfare or convenience .... To be a valid exercise of police power, the legislation must bear a reasonable relationship to one of the foregoing interests which is sought to be protected, and the means adopted must constitute a reasonable method to accomplish such objective .... Although the determination of reasonableness is a matter for the court, the legislature has broad discretion to determine not only what the interests of the public welfare require but what measures are necessary to secure such interest .... The court will not disturb a police regulation merely where there is room for a difference of opinion as to its wisdom, necessity and expediency. *Id.* at 114-15, 34 Ill.Dec. 832, 398 N.E.2d 829 (citations omitted).

See also People v. Haron, 85 Ill.2d 261, 279-80, 52 Ill.Dec. 625, 422 N.E.2d 627 (1981) ("[T]he standard of a proper exercise of the police power is whether the statute is reasonably designed to remedy the evils which the legislature has determined to be a threat to the public health, safety and general welfare." (citation omitted)).

Certainly, there can be no question that the Morton Grove ordinance is oriented to those interests which are proper aims of any exercise of the state's police power. The preamble to the ordinance demonstrates that the public health and safety were uppermost in the minds of the Trustees of Morton Grove. The preamble states:

WHEREAS, it has been determined that in order to promote and protect the health and safety and welfare of the public it is necessary to regulate the possession of firearms and other dangerous weapons, and

WHEREAS, the Corporate Authorities of the Village of Morton Grove have found and determined that the easy and convenient availability of certain types of firearms and weapons have increased the potentiality of firearms related deaths and injuries, and

WHEREAS, handguns play a major role in the commission of homicide, aggravated assault, and armed robbery, and accidental injury and death.

The public health and safety are proper police power objectives. Illinois courts have consistently held firearms controls to be within the purview of the police power. *See Brown v. City of Chicago*, 42 Ill.2d 501, 250 N.E.2d 129 (1969) (declaring Chicago firearms registration ordinance valid); *Biffer v. City of Chicago, supra* (declaring Chicago ordinance restricting sale of concealable weapons valid); *Rawlings v. Department of Law Enforcement*, 73 Ill.App.3d 267, 29 Ill.Dec. 333, 391 N.E.2d 758 (3d Dist. 1979) (declaring Illinois statute prohibiting, *inter alia*, former mental patients from obtaining gun licenses to be a valid exercise of the police power); *People v. Williams*, 60 Ill.App.3d 726, 18 Ill.Dec. 132, 377 N.E.2d 285 (1st Dist. 1978) (declaring Illinois concealed weapons statute

valid). Here, too, the court concludes that Morton Grove's firearms ordinance is properly related to the public health and safety.

The above finding that the interests sought to be protected by the Trustees of Morton Grove may properly be the targets of an exercise of the police power does not end this court's inquiry. The question remains whether the Morton Grove ordinance, which effectively bans the possession of any handguns, is a reasonable method of promoting the interests of public health and safety.

The plaintiffs suggest in the strongest possible terms that this requirement for a proper exercise of the police power has not been met here. They argue that the ordinance does not reflect a reasonable response to the problems of weapons misuse, but rather is an arbitrary and simplistic response, resulting in an unreasonable and capricious exercise of the police power.

Morton Grove defends its ordinance as a reasonable legislative response to the very serious problem of handguns in our society, and disputes the characterization of its ordinance as a total prohibition of firearms, or even handguns. By its terms, the ordinance (1) excludes "long guns" such as shot guns and rifles from its proscriptions; (2) exempts certain individuals, such as peace officers, members of the armed forces, and licensed gun collectors, from many of the ordinance's restrictions; and (3) allows the continued recreational use of handguns under certain conditions, at licensed gun clubs. The inclusion of those exceptions, the Village argues, indicates that the Trustees attempted to construct an ordinance broad enough to effectuate its objective of protecting public safety without unnecessarily restricting the possession and use of firearms.

In reviewing the reasonableness of Morton Grove's ordinance, it is necessary to recognize certain important limitations on the court's review function. First, it is not the role of the court to test the factual validity of the findings which support an exercise of the police power. That is a uniquely legislative

responsibility. The Illinois Supreme Court made this very clear when it ruled on the validity of Chicago's gun registration ordinance in 1969:

> Plaintiffs argue at length that strict gun laws do not tend to reduce crime, and statistics and excerpts from reports of surveys are quoted to show that legal restrictions are easily circumvented by experienced criminals . . . . These arguments, whatever validity they might have, are not appropriately addressed to this court. They relate to matters of legislative instead of judicial concern, and bear on the advisability of the present provisions rather than on their validity."

Brown v. City of Chicago, 42 Ill.2d at 507, 250 N.E.2d 129. This court is not free, in reviewing Morton Grove's ordinance, to reexamine and reweigh the evidence upon which the legislative decision was premised.

In addition, the court is not to decide whether the means selected by the legislature are the best way to deal with the perceived problem, or whether other alternatives available would have been better. As quoted above, "The court will not disturb a police regulation merely where there is room for a difference of opinion as to its wisdom, necessity, and expediency." *City of Carbondale,* 78 Ill.2d at 115, 34 Ill.Dec. 832, 398 N.E.2d 829. See *Memorial Gardens Assoc. v. Smith,* 16 Ill.2d 116, 156 N.E.2d 587, *appeal dismissed,* 361 U.S. 31, 80 S.Ct. 121, 4 L.Ed.2d 98 (1959); *State Dental Society v. Sutker,* 76 Ill.App.3d 240, 32 Ill.Dec. 67, 395 N.E.2d 14 (1st Dist. 1979), *cert. denied,* 447 U.S. 930, 100 S.Ct. 3029, 65 L.Ed.2d 1124 (1980).

The appropriate test is one of arbitrariness. *City of Carbondale,* 78 Ill.2d at 115, 34 Ill.Dec. 832, 398 N.E.2d 829. A prediction that the present ordinance may not be a panacea for all of the problems arising from the possession and use of handguns would not prove the plaintiffs' contention that this ordinance is arbitrary and simplistic. If the present ordinance was adopted on the expectation of the Trustees that it would serve to inch the Morton Grove community one step further to be coming peaceable and safe, this would justify the use of the

police power. Many social experiments have only small beginnings.

The issue of whether or not private citizens should be allowed to possess handguns freely, whether for their own defense or for other purposes, has constantly been in the political arena. Plaintiffs themselves have presented substantial material to this court showing that the question was controversial in England as early as the 1600's. Certainly it was a very important issue in the debates of the Illinois Constitutional Convention, as is shown by the preceding review of those debates. The Trustees of the Village of Morton Grove could not have been unaware of the existence of the handgun debate.

In addition, the Morton Grove Trustees were entitled to take notice of a recent Illinois case in which the instant provision of the Illinois Constitution was discussed. *People v. Williams, supra,* involved a prosecution under the Illinois Criminal Code for knowing possession within a city of "any loaded pistol, revolver or other firearm." 60 Ill.App.3d at 727, 18 Ill.Dec. 132, 377 N.E.2d 285. An exception in that statute allowed possession by an individual in his own home or place of business. The defendant in that case had in his possession a .32-caliber pistol loaded with four rounds of live ammunition and one spent round. The Illinois Appellate Court had no difficulty in finding that the Criminal Code provision was a reasonable exercise of the police power, because the state had a valid interest in controlling crime within its borders. *See also, Rawlings v. Department of Law Enforcement, supra.*

In addition to controlling crime, the Trustees also stated in the preamble that they were attempting to reduce the incidence of handgun related accidents. The Trustees needed only to read the daily papers to have been aware of the large number of tragic accidents involving the use or misuse of handguns in the home. Furthermore, it cannot be ignored that there is some support for the link between accidental injuries and handguns, specifically. As one commentator observed:

> The handgun-long gun distinction is founded both in the existence of legitimate recreational uses of long

> guns and on persuasive empirical evidence that long guns are not misused nearly as frequently as handguns."

Comment, *The Impact of State Constitutional Right to Bear Arms Provisions on State Gun Control Legislation,* 38 U.Chi. Rev. 185, 207 (1970). Certainly, the Village has a valid interest in attempting to reduce the possibility of firearms catastrophes in Morton Grove. A ban on the possession of handguns in the home cannot be considered an unreasonable response to that problem, and may in fact be the only method of attaining the goal sought by the Trustees.

In addition to claiming that Morton Grove's exercise of its police power is "arbitrary and simplistic," plaintiffs also argue that the ordinance is invalid because it is a prohibition of the possession of handguns, rather than a regulation of their use. Plaintiffs rely on *In re Brickey, supra,* and *Andrews v. State,* 50 Tenn. 165 (1871), to suggest that the police power does not include the power to prohibit.

That argument by the plaintiffs misstates current Illinois law. As stated above, the police power does include the power to prohibit. "In the exercise of its inherent police power, the legislature may enact laws regulating, restraining *or prohibiting* anything harmful to the welfare of the people, even though such regulation, restraint *or prohibition* interferes with the liberty or property of an individual." *People v. Warren,* 11 Ill.2d at 424-25, 143 N.E.2d 28 (emphasis added). *See Biffer v. City of Chicago, supra; Liquor Control Commission v. City of Calumet City, supra.*

Given that the Morton Grove ordinance is a reasonable response to the problems seen by the Trustees, it is not automatically invalid because it is a prohibition rather than a regulation.

In sum, this court concludes that the Morton Grove ordinance has as its basis the proper goals of protecting the safety and health of the people. In addition, the court finds that the ordinance does not represent a complete ban on firearms, and is reasonable and neither arbitrary nor simplistic. The ordinance was both properly and validly enacted under Morton

Grove's police power. Therefore, the court concludes that ordinance # 81-11 does not violate any of the plaintiffs' rights under the Illinois Constitution.

United States Constitutional Issues

In addition to their claims under the Illinois State Constitution, the plaintiffs also argue that the Morton Grove ordinance violates the United States Constitution, specifically the Second, Fifth, Ninth and Fourteenth Amendments.

A. *Second and Fourteenth Amendments*

[5] The Second Amendment provides as follows:

> A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

The plaintiffs rely substantially on historical arguments to buttress their contention that the Morton Grove ordinance infringes upon that Amendment. They review (1) the common law background of the right of individuals to possess weapons; (2) the impetus for the Second Amendment, which was the constitutional framers' fear that a national standing army would be inimical to personal rights and liberties; and (3) pre-Civil War judicial decisions in which the individual's right to bear arms was considered. Based on those materials, plaintiffs conclude that the Second Amendment conferred an individual right to keep and bear arms, including handguns, as opposed to a collective right in the states to maintain a militia separate from the federal standing army. After reaching that conclusion, plaintiffs then review the history of the Fourteenth Amendment and suggest that its framers intended that the Second Amendment should apply to the actions of the states.

Defendant Morton Grove's main response to plaintiffs' arguments is extremely simple. The Village points to the Supreme Court's decision in *Presser v. Illinois,* 116 U.S. 252, 6 S.Ct. 580, 29 L.Ed. 615 (1886), in which the Court held that the prohibitions of the Second Amendment limited only the power of the United States Congress, and not the power of the

individual states. Since this court is bound by the pronouncement of the Supreme Court, the Village argues that plaintiffs' contentions are largely irrelevant. In the alternative, Morton Grove also controverts the specific arguments made by the plaintiffs. The defendant claims that the Second Amendment does not create an individual right, but merely prohibits legislation that would impair the states' right to have a militia. *See United States v. Miller,* 307 U.S. 174, 59 S.Ct. 816, 83 L.Ed. 1206 (1939). Also, the Village specifically refutes each of the plaintiffs' arguments, contending that they are not supported by common law traditions, the history of the Second Amendment, early state court decisions, or the statements of the framers of the Fourteenth Amendment. While some of those arguments are persuasive, there is no purpose in considering them further in view of the controlling *Presser* decision.

At issue in *Presser* was an Illinois statute which forbade private organizations from parading with arms in any city or town of the state, without a license from the Governor. Presser was convicted and fined for violating the statute. On Appeal to the Supreme Court, Presser claimed that the Illinois provision infringed his Second Amendment right. The Court rejected that argument, stating as follows:

> [A] conclusive answer to the contention that this amendment prohibits the legislation in question lies in the fact that the amendment is a limitation only upon the power of Congress and the National government, and not upon that of the States. It was so held by this court in the case of *United States v. Cruikshank,* 92 U.S. 542, 553, 23 L.Ed. 588, in which the Chief Justice, in delivering the judgment of the court, said, that the right of the people to keep and bear arms
>
> > "is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence. The Second Amendment declares that it shall not be infringed, but this, as has been seen, means no more than that it shall not be infringed by Congress. This is one of the amendments that has no other effect than to restrict the powers of the National government, leaving the people to look for their protection against any violation by their fellow-

> citizens of the rights it recognizes to what is called in *The City of New York v. Miln*, 11 Pet. [102] 139, [9 L.Ed. 648] the 'powers which relate to merely municipal legislation, or what was perhaps more properly called internal police,' 'not surrendered or restrained' by the Constitution of the United States."

Id. 116 U.S. at 265, 6 S.Ct. at 584. The obvious holding of *Presser* is that the Second Amendment was not incorporated into the Fourteenth, and that it does not serve as a check on the power of the state legislature or municipal councils in Illinois.

The Supreme Court has never reconsidered its holding in *Presser*. Consequently, that opinion stands as the Supreme Court's most recent pronouncement on the issue of whether the Second Amendment was incorporated into the Fourteenth Amendment so as to limit the power of the states. It is a truism that the district court is bound by the holdings of the Supreme Court to the extent that they bear on questions before the district court. *Hendricks County Rural Electric Membership Corp. v. NLRB*, 627 F.2d 766 (7th Cir. 1980), *rev'd on other grounds*, ____U.S.____, 102 S.Ct. 216, 70 L.Ed.2d 323 (1981). That rule applies irrespective of the age of the Supreme Court opinion, the district judge's personal opinion of the validity of the Supreme Court's action, or whether he believes the Supreme Court would rule as it did if the issue were again before it. *United States v. Chase*, 281, F.2d 225 (7th Cir. 1960); *Sullivan Outdoor Advertising, Inc. v. Department of Transportation*, 420 F.Supp. 815 (N.D.Ill.1976).

Plaintiffs make two principal arguments in urging that this court not follow the holding in *Presser*.[5] They argue first that *Presser*, when read properly, actually supports, rather than

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[5] Plaintiffs' other arguments, urging this court to find that the ordinance infringes the Second Amendment, include claims based on the history of the Fourteenth Amendment, the general change in the viewpoint of the Supreme Court concerning the issue of incorporation, and early state cases addressing the individual's right to bear arms. Those arguments would require the court, if it accepted them, to reach a decision contrary to the holding in *Presser*. Since this court has no power or authority to do that, the arguments are irrelevant here.

contradicts, their contention that the ordinance is unconstitutional. Second, they claim that irrespective of how *Presser* is read, it is no longer good law; in effect saying that the later cases incorporating several of the first ten amendments into the Fourteenth Amendment overrule *Presser sub silentio.* Neither of those arguments is persuasive.

Plaintiffs seize upon the phrase in *Presser* that "the States cannot, even laying the constitutional provision in question out of view, prohibit the people from keeping and bearing arms . . . , " 116 U.S. at 265, 6 S.Ct. at 584, to support their argument that defendant has misread that decision. When the phrase is read in context, however, it actually supports Morton Grove's position in this case, not the plaintiffs'.

The entire phrase referred to above, from which the plaintiffs have relied on but a portion, reads as follows:

> [T]he States cannot, even laying the constitutional provision in question out of view, prohibit the people from keeping and bearing arms, so as to deprive the United States of their rightful resource for maintaining the public security, and disable the people from performing their duty to the general government.

Id. Plaintiffs here have not suggested that the Morton Grove ordinance in any way interferes with the ability of the United States to maintain public security nor could they make an argument to that effect. Irrespective of the Constitutional framers' fear of a national standing army, the United States currently has one and relies upon it, not upon armed private citizens, to maintain public security.

In relying upon the above quoted phrase, plaintiffs also overlook the immediately previous sentence in *Presser,* in which the Supreme Court cites *Mayor of New York v. Miln,* 36 U.S. (11 Pet.) 102, 9 L.Ed. 648 (1837). At the place cited to in *Presser,* the Court in *Miln* said the following:

> [A] state has the same undeniable and unlimited jurisdiction over all persons and things, within its territorial limits, as any foreign nation; where that jurisdiction is not surrendered or restrained by the

> constitution of the United States. That, by virtue of this, it is not only the right, but the bounden and solemn duty of a state, to advance the safety, happiness and prosperity of its people, and to provide for its general welfare, by any and every act of legislation, which it may deem to be conducive to these ends; where the power over the particular subject, or the manner of its exercise is not surrendered or restrained, in the manner just stated. That all those powers which relate to merely municipal legislation, or what may, perhaps, more properly be called *internal police*, are not thus surrendered or restrained; and that, consequently, in relation to these, the authority of a state is complete, unqualified and exclusive.

36 U.S. (11 Pet.) at 139, 9 L.Ed. 648 (emphasis in original). Read in context, the phrase referred to by the plaintiffs was not meant to be a limitation on the authority of the states, but merely stated the obvious position that, whenever required by the federal government or absent any regulation whatsoever, an individual has the right to keep and bear arms. Under certain circumstances, that right may be limited by the states through the valid exercise of what has come to be known as the "police power," without fear that any United States Constitutional provisions will be infringed. As was discussed at length above in this court's review of the Illinois Constitution, the Morton Grove ordinance is a valid exercise of the police power. *Presser* requires no more than that.

Plaintiffs' second argument, that *Presser* has been overruled *sub silentio* by later decisions of the Supreme Court is equally unavailing. In their memorandum on this position, plaintiffs rely substantially on Justice Black's dissenting opinion in *Adamson v. California*, 332 U.S. 46, 67 S.Ct. 1672, 91 L.Ed. 1903 (1947) (Black, J., dissenting). Although three other Justices concurred with Justice Black that the Bill of Rights, in its entirety, should be incorporated into the protections offered by the Fourteenth Amendment, that position has never been accepted by a majority of the Supreme Court. *See* L. Tribe, *American Constitutional Law* § 11—2 (1978). That situation is

underscored by the fact that some provisions of the Bill of Rights, in addition to the Second Amendment, have never been held to apply to the states. *See Watson v. Jago,* 558 F.2d 330 (6th Cir. 1977) (Fifth Amendment right to indictment by a grand jury); *Iacaponi v. New Amsterdam Casualty Co.,* 258 F.Supp. 880 (W.D.Pa.1966), *aff'd,* 379 F.2d 311 (3d Cir. 1967), *cert. denied,* 389 U.S. 1054, 88 S.Ct. 802, 19 L.Ed.2d 849 (1968) (Seventh Amendment right to a jury trial in civil cases).

The language in *Malloy v. Hogan,* 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964), quoted by the plaintiffs, is not to the contrary. In that case, the Supreme Court rejected "the notion that the Fourteenth Amendment applies to the States only a 'watered-down, subjective version of the individual guarantees of the Bill of Rights'." 378 U.S. at 10-11, 84 S.Ct. at 1494-1495, (quoting from *Ohio ex rel. Eaton v. Price,* 364 U.S. 263, 275, 80 S.Ct. 1463, 1469, 4 L.Ed.2d 1708 (1960) (Brennan, J., dissenting)). That statement was not intended by the Court to be a wholesale incorporation of the Bill of Rights into the Fourteenth Amendment, but rather to give content to a particular right that had already been incorporated. Justice Harlan's dissent in *Poe v. Ullman,* 367 U.S. 497, 81 S.Ct. 1752, 6 L.Ed.2d 989 (1961) (Harlan, J., dissenting), also fails to provide any support to plaintiffs here. While Justice Harlan did recognize that the right to keep and bear arms was protected by the Bill of Rights, he was careful to note that the Supreme Court has consistently resisted the notion that the Fourteenth Amendment was merely a shorthand reference to what was set out in the Bill of Rights. *Id.* at 541, 81 S.Ct. at 1775.

Presser directly bears on the issue of whether the states or their political subdivisions are limited by the Second Amendment, and it is still good law, notwithstanding plaintiffs' arguments to the contrary. *Presser* controls this court and, therefore, requires it to hold that the Second Amendment does not apply to the states and localities and so is not infringed by the Morton Grove ordinance. Numerous state and lower federal courts who have considered the issue agree with this conclusion. *See Cases v. United States,* 131 F.2d 916 (1st Cir. 1942), *cert. denied,* 319 U.S. 770, 63 S.Ct. 1431, 87 L.Ed. 1718 (1943); *Eckert v. City of Philadelphia,* 329 F.Supp. 845 (E.D.Pa. 1971),

aff'd, 477 F.2d 610 (3d Cir.), *cert. denied,* 414 U.S. 843, 94 S.Ct. 104, 38 L.Ed.2d 81 (1973); *In re Atkinson,* 291 N.W.2d 396 (Minn.1980); *State v. Amos,* 343 So.2d 166 (La.1977); *Commonwealth v. Davis,* 369 Mass. 886, 343 N.E.2d 847 (1976); *State v. Sanne,* 116 N.H. 583, 364 A.2d 630 (1976); *Harris v. State,* 83 Nev. 404, 432 P.2d 929 (1967); *State v. Swanton,* 129 Ariz. 131, 629 P.2d 98 (Ct.App.1981).

B. ***Ninth Amendment***

The Ninth Amendment to the United States Constitution provides:

> The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people.

Plaintiffs' arguments under this provision center on a claimed right to self defense. They suggest that the right to bear arms for the purpose of self defense was recognized by several famous natural law philosophers, among them Aristotle, Cicero, and John Locke. Cicero, for instance, noted "if our lives are endangered by plots or violence or armed robbers or enemies, any and every method of protecting ourselves is morally right." Cicero, *In Defense of Titus Annius Milo,* Selected Political Speeches 222 (M. Grant trans. 1969). In addition, plaintiffs point to several early court decisions under the English common law, which recognized the right of individuals to keep and use weapons for personal defense and defense of the home.

Although plaintiffs' arguments have an understandable facial appeal, the court is unable to accept the argument that this claimed right is protected by the Ninth Amendment.

Neither plaintiffs, the defendant, nor this court has discovered a single instance in which the Supreme Court has explicitly held that a particular right was protected by the Ninth Amendment. In the situations where the Court has given protection to individual rights not explicitly listed in the first ten amendments, it has relied on "penumbras, formed by emanations from those guarantees that help give them life and

substance." *Griswold v. Connecticut,* 381 U.S. 479, 484, 85 S.Ct. 1678, 1681, 14 L.Ed.2d 510 (1965). The only rights so recognized by the Court have involved the truly personal and private rights relating to questions of family and procreation. *See Moore v. City of East Cleveland,* 431 U.S. 494, 97 S.Ct. 1932, 52 L.Ed.2d 531 (1977); *Roe v. Wade,* 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973); *Griswold, supra.* Never has the Court recognized anything like a right to self defense, or a right to carry handguns, based either on the penumbra theory or directly under the Ninth Amendment.

The only explicit discussion in any Supreme Court opinion of the Ninth Amendment and its reach appears in the concurrence by Justice Goldberg in *Griswold,* 381 U.S. at 486-99, 85 S.Ct. at 1682-90. Justice Goldberg argued that there were certain fundamental rights, arising from the "traditions and [collective] conscience of our people,"—*id.* at 493, 85 S.Ct. at 1686 (*quoting Snyder v. Massachusetts,* 291 U.S. 97, 105, 54 S.Ct. 330, 332, 78 L.Ed. 674 (1934)), which required the protection of the Ninth Amendment. Whatever the appeal of such an analysis, Justice Goldberg's thesis has never been accepted by a majority of the Supreme Court. The Ninth Amendment furnishes no support for the plaintiffs' fundamental right argument. The Morton Grove ordinance does not violate its provisions.

C. *Fifth Amendment*

Plaintiffs Quilici and Stengl both alleged in their complaints that the Morton Grove ordinance infringed the Fifth Amendment, which prohibits the taking of private property for public use, "without just compensation." Plaintiffs appear to have abandoned that argument, by failing to discuss it in their memoranda of law filed with this court. Nonetheless, for the sake of completeness, the court will address it briefly.

[8-10] It is well established that a Fifth Amendment taking can occur through the exercise of the police power regulating property rights. In order for a regulatory taking to require compensation, however, the exercise of the police power must result in the destruction of the use and enjoyment of a legitimate private property right. *Kaiser Aetna v. United States,*

444 U.S. 164, 100 S.Ct. 383, 62 L.Ed.2d 332 (1979); *Devines v. Maier,* 665 F.2d 138, No. 80-2315 (7th Cir. November 23, 1981). The Morton Grove ordinance does not go that far. The geographic reach of the ordinance is limited; gun owners who wish to may sell or otherwise dispose of their handguns outside of Morton Grove. *See Fesjian v. Jefferson,* 399 A.2d 861 (D.C.App.1979). If handgun owners do not wish to sell their weapons, they may simply register and store them at a licensed gun club. Finally, the ordinance has an exception for licensed collectors, for whom neither of those two alternatives may be acceptable.

D. ***Vagueness***

In his memorandum, plaintiff Quilici implies that the ordinance is unconstitutionally vague. He suggests specifically that the ordinance's definition of "handgun" as "a firearm of a size which may be concealed upon the person" might apply to shotguns and rifles in an unpredictable manner.

The conditions under which vagueness challenges to a statute may be considered have been clearly set out by the Supreme Court. "It is well-established that vagueness challenges to statutes which do not involve First Amendment freedoms must be examined in the light of the facts of the case at hand." *United States v. Mazurie,* 419 U.S. 544, 550, 95 S.Ct. 710, 714, 42 L.Ed.2d 706 (1975). *See United States v. McCauley,* 601 F.2d 336 (8th Cir. 1979); *United States v. Howard,* 569 F.2d 1331 (5th Cir.), *cert. denied,* 439 U.S. 834, 99 S.Ct. 116, 58 L.Ed.2d 130 (1978). Plaintiff has failed to present an issue of the meaning of the statute as it applies to any weapon possessed by him. Rather, plaintiff, in his complaint, alleges that he owns handguns which are subject to the strictures of the ordinance. It is obvious that the ordinance gives Mr. Quilici "adequate warning" that his conduct would be illegal. *United States v. Powell,* 423 U.S. 87, 93, 96 S.Ct. 316, 320, 46 L.Ed.2d 228 (1975).

CONCLUSION

Perhaps the clearest fact that emerges from this litigation is that the issue of gun control, in whatever form, is controversial. Reasonable people can, in good conscience, oppose what Morton Grove has done, while equally reasonable people can fully support this ordinance. Perhaps nowhere else is that situation more clearly demonstrated than in the lengthy and well thought out briefs filed by the opposing parties in this case.

After full consideration, the court has concluded that the Morton Grove ordinance was properly enacted pursuant to the police power, and that it does not infringe upon the rights guaranteed by the United States Constitution. Although those legal questions decided by this court will reach finality at some point in time, the debate over the wisdom of this legislation will continue. Article 1, section 22 of the Illinois Constitution was drafted and presented to the voters of Illinois as a reflection of the conflicting views of the delegates. The voters of Illinois then approved the new Constitution with the express provision that the right to bear arms would be subject to the police power. The Trustees of Morton Grove, also acting in an atmosphere of public debate and conflict, have made a legislative decision that the danger posed by the easy availability of handguns is serious enough to warrant the banning of all handguns within this particular community. Before taking this action, the Morton Grove Trustees must have been aware of the deep-seated conviction of a number of its citizens that they should be permitted to retain handguns for the protection of person and property. The Trustees concluded, however, that the public interest outweighed the claimed personal interests of the opponents of this legislation. The ultimate settlement of this troublesome political question must be returned to the citizens of Morton Grove where it properly belongs rather than in the courts.

For all the reasons stated above, the court finds that the Morton Grove ordinance is valid. It does not infringe any of the provisions of either the Illinois State Constitution or the United States Constitution. Therefore, defendant's motion for summary judgment is granted, and plaintiffs' motion are denied. The stay precluding enforcement of the ordinance is hereby lifted.

APPENDIX

ORDINANCE NO. 81-11

AN ORDINANCE REGULATING THE POSSESSION OF FIREARMS AND OTHER DANGEROUS WEAPONS

WHEREAS, it has been determined that in order to promote and protect the health and safety and welfare of the public it is necessary to regulate the possession of firearms and other dangerous weapons, and

WHEREAS, the Corporate Authorities of the Village of Morton Grove have found and determined that the easy and covenient availability of certain types of firearms and weapons have increased the potentiality of firearm related deaths and injuries, and

WHEREAS, handguns play a major role in the commission of homicide, aggravated assault, and armed robbery, and accidental injury and death.

NOW, THEREFORE, BE IT ORDAINED BY THE PRESIDENT AND BOARD OF TRUSTEES OF THE VILLAGE OF MORTON GROVE, COOK COUNTY, ILLINOIS, AS FOLLOWS:

SECTION 1: The Corporate Authorities do hereby incorporate the foregoing WHEREAS clauses into this Ordinance, thereby making the findings as hereinabove set forth.

SECTION 2: That Chapter 132 of the Code of Ordinances of the Village of Morton Grove be and is hereby amended by the addition of the following section:

"*Section 132.102.* Weapons Control

(A) *Definitions:*

Firearm: "Firearm" means any device by whatever name known, which is designed to expel a projectile or projectiles by

the action of an explosion, expansion of gas or escape of gas; excluding however:

(1) Any pneumatic gun, spring gun or B-B gun which expels a single globular projectile not exceeding .18 inches in diameter.

(2) Any device used exclusively for signalling or safety and required or recommended by the United States Coast Guard or the Interstate Commerce Commission.

(3) Any device used exclusively for the firing of stud cartridges, explosive rivets or similar industrial ammunition.

(4) An antique firearm (other than a machine gun) which, although designed as a weapon, the Department of Law Enforcement of the State of Illinois finds by reason of the date of its manufacturer, value, design and other characteristics is primarily a collector's item and is not likely to be used as a weapon.

(5) Model rockets designed to propel a model vehicle in a vertical direction.

Handgun: Any firearm which (a) is designed or redesigned or made or remade, and intended to be fired while held in one hand or (b) having a barrel of less than 10 inches in length or (c) a firearm of a size which may be concealed upon the person.

Person: Any individual, corporation, company, association, firm, partnership, club, society or joint stock company.

Handgun Dealer: Any person engaged in the business of (a) selling or renting handguns at wholesale or retail (b) manufacture of handguns (c) repairing handguns or making or fitting special barrels or trigger mechanisms to handguns.

Licensed Firearm Collector: Any person licensed as a collector by the Secretary of the Treasury of the United States under and by virtue of Title 18, United States Code, Section 923.

Licensed Gun Club: A club or organization, organized for the purpose of practicing shooting at targets, licensed by the

Village of Morton Grove under Section 90.20 of the Code of Ordinances of the Village of Morton Grove.

(B) *Possession:*

No person shall possess, in the Village of Morton Grove the following:

(1) Any bludgeon, black-jack, slug shot, sand club, sand bag, metal knuckles or any knife, commonly referred to as a switchblade knife, which has a blade that opens automatically by hand pressure applied to a button, spring, or other device in the handle of the knife; or

(2) Any weapon from which 8 or more shots or bullets may be discharged by a single function of the firing device, any shotgun having one or more barrels less than 18 inches in length, sometimes called a sawed off shotgun or any weapon made from a shotgun, whether by alteration, modification or otherwise, if such weapon, as modified or altered has an overall length of less than 26 inches, or a barrel length of less than 18 inches or any bomb, bomb-shell, grenade, bottle or other container containing an explosive substance of over one-quarter ounce for like purposes, such as, but not limited to black powder bombs and Molotov cocktails or artillery projectiles; or

(3) Any handgun, unless the same has been rendered permanently inoperative.

(C) Subsection B(1) shall not apply to or affect any peace officer.

(D) Subsection B(2) shall not apply to or affect the following:

(1) Peace officers;

(2) Wardens, superintendents and keepers of prisons, penitentiaries, jails and other institutions for the detention of persons accused or convicted of an offense;

(3) Members of the Armed Services or Reserve Forces of the United States or the Illinois National Guard, while in the performance of their official duties; and

(4) Transportation of machine guns to those persons authorized under Subparagraphs (1) and (2) of this subsection to possess machine guns, if the machine guns are broken down in a non-functioning state or not immediately accessible.

(E) Subsection B(3) does not apply to or affect the following:

(1) Peace officers or any person summoned by any peace officer to assist in making arrests or preserving the peace while he is actually engaged in assisting such officer and if such handgun was provided by the peace officer;

(2) Wardens, superintendents and keepers of prisons, penitentiaries, jails and other institutions for the detention of persons accused or convicted of an offense;

(3) Members of the Armed Services or Reserve Forces of the United States or the Illinois National Guard or the Reserve Officers Training Corps. while in the performance of their official duties.

(4) Special Agents employed by a railroad or a public utility to perform police functions; guards of armored car companies; watchmen and security guards actually and regularly employed in the commercial or industrial operation for the protection of persons employed and private property related to such commercial or industrial operation;

(5) Agents and investigators of the Illinois Legislative Investigating Commission authorized by the commission to carry such weapons;

(6) Licensed gun collectors;

(7) Licensed gun clubs provided the gun club has premises from which it operates and maintains possession and control of hanguns used by its members, and has procedures and facilities for keeping such handguns in a safe place, under the control of the club's chief officer, at all times when they are not being used for target shooting or other sporting or recreational purposes at the premises of the gun club; and gun club members while such members are using their hanguns at the gun club premises;

(8) A possession of an antique firearm;

(9) Transportation of handguns to those persons authorized under Subparagraph 1 through 8 of this subsection to possess handguns, if the handguns are broken down in a non-functioning state or not immediately accessible.

(10) Transportation of handguns by persons from a licensed gun club to another licensed gun club or transportation from a licensed gun club to a gun club outside the limits of Morton Grove; provided however that the transportation is for the purpose of engaging in competitive target shooting or for the purpose of permanently keeping said handgun at such new gun club; and provided further that at all times during such transportation said handgun shall have trigger locks securely fastened to the handgun.

(F) *Penalty:*

(1) Any person violating Section B(1) or B(2) of this Ordinance shall be guilty of a misdemeanor and shall be fined not less than $100.00 nor more than $500.00 or incarcerated for up to six months for each such offense.

(2) Any person violating Section B(3) of this Ordinance shall be guilty of a petty offense and shall be fined no less than $50.00 nor more than $500.00 for such offense. Any person violating Section B(3) of this Ordinance more than one time shall be guilty of a misdemeanor and shall be fined no less than $100.00 nor more than $500.00 or incarcerated for up to six months for each such offense.

(3) Upon conviction of a violation of Section B(1) through B(3) of this Ordinance, any weapon seized shall be confiscated by the trial court and when no longer needed for evidentiary purposes, the court may transfer such weapon to the Morton Grove Police Dept. who shall destroy them.

(G) *Voluntary Delivery to Police Department*

(1) If a person voluntarily and peaceably delivers and abandons to the Morton Grove Police Dept. any weapon mentioned in Sections B(1) through B(3), such delivery shall preclude the arrest and prosecution of such person on a charge of violating any provision of this Ordinance with respect to the

weapon voluntarily delivered. Delivery under this section may be made at the headquarters of the police department or by summoning a police officer to the persons residence or place of business. Every weapon to be delivered and abandoned to the police department under this paragraph shall be unloaded and securely wrapped in a package and in the case of delivery to the police headquarters, the package shall be carried in open view. No person who delivers and abandons a weapon under this section shall be required to furnish identification, photographs or fingerprints. No amount of money shall be paid for any weapon delivered or abandoned under this paragraph.

(2) Whenever any weapon is surrendered under this section, the police department shall inquire of all law enforcement agencies whether such weapon is needed as evidence and if the same is not needed as evidence, it shall be destroyed.

(H) All weapons ordered confiscated by the court under the provisions of Section F(3) and all weapons received by the Morton Grove Police Department under and by virtue of Section G shall be held and identified as to owner, where possible, by the Morton Grove Police Department for a period of five years prior to their being destroyed.

(I) *Construction:*

Nothing in this Ordinance shall be construed or applied to necessarily require or excuse non compliance with any provision of the laws of the State of Illinois or to the laws of the United States. This Ordinance and the penalties proscribed for violation hereof, shall not supersede, but shall supplement all statutes of the State of Illinois or of the United States in which similar conduct may be prohibited or regulated.

(J) *Severability:*

If any provision of this Ordinance or the application thereof to any person or circumstance is held invalid, the remainder of this Ordinance and the applicability of such provision to other persons not similiarly situated or to other circumstances shall not be affected thereby.

(K) The provisions of this Ordinance shall take effect ninety (90) days from and after its passage, approval and publication in pamphlet form according to law."

SECTION 3: That this Ordinance shall be published in pamphlet form. Said pamphlet shall be received as evidence of the passage and legal publication of this Ordinance.

PASSED this _____ day of _____, 1981.

Trustee Cashman _____
Trustee Dechert _____
Trustee Hohs _____
Trustee Greenberg _____
Trustee Sneider _____
Trustee Youstra _____

APPROVED by me this ____ day of _____, 1981.

_____
President of the
VILLAGE OF MORTON GROVE,
Cook County, Illinois.

ATTESTED and FILED in my office this ____ day of _____, 1981, and published in pamphlet form this ____ day of _____, 1981.

_____
Clerk of the VILLAGE OF MORTON GROVE,
Cook County, Illinois

Published in pamphlet form this ____ day of _____, 1981, by order of the President and Board of Trustees of the VILLAGE OF MORTON GROVE, Cook County, Illinois.

In The

United States District Court

FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

VICTOR D. QUILICI,

Plaintiff,

v.

VILLAGE OF MORTON GROVE,

Defendant.

ROBERT STENGL, et al.,

Plaintiffs,

v.

VILLAGE OF MORTON GROVE, et. al.,

Defendants.

GEORGE L. REICHERT, et al.,

Plaintiffs,

v.

VILLAGE OF MORTON GROVE,

Defendant.

Nos. 81 C 3432, 81 C 4086, 81 C 5071 (Consolidated)
Hon. Bernard M. Decker

JUDGMENT ORDER

These consolidated cases were before the Court on plaintiffs' motions for summary judgment and defendants' cross-motion for summary judgment. The motions have been fully briefed by the parties, and the Court has carefully reviewed and considered all arguments set forth in them. The Court being in all respects fully advised and informed,

IT IS ORDERED:

1. Defendants' motion for summary judgment is granted.

2. Each of plaintiffs' motions for summary judgment is denied.

3. Judgment is entered in favor of defendants and against plaintiffs on each and every claim of plaintiffs' complaints.

ENTER:

Bernard M. Decker
United States District Judge

Dated: Dec 29 1981

IN THE

United States District Court

FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

VICTOR QUILICI,
Plaintiff,

-vs- **No. 81 C 3432**

VILLAGE OF MORTON GROVE,
Defendant.

MEMORANDUM OPINION AND ORDER

Victor Quilici brought this action against the Village of Morton Grove to overturn an ordinance that relates to the possession of handguns and other dangerous weapons within the Village. Plaintiff claims that the Act violates both the Illinois State Constitution and the United States Constitution. Currently pending is plaintiff's motion to abstain and remand the case back to the Illinois court where it was originally filed.

Since this action raises a federal question within this court's original jurisdiction, there can be no doubt that the action was properly removed. 28 U.S.C. § 1441. As well, this court is fully competent to decide the state law questions and absent extraordinary circumstances, has a duty to do so. *Meredith v. Winter Haven,* 320 U.S. 228, 236-7 (1943).

Plaintiff argues that this court should not decide the Illinois constitutional question under the doctrine of abstention announced in *Railroad Comm'n v. Pullman,* 312 U.S. 496 (1941). The court disagrees for several reasons.

Before a court abstains under *Pullman,* it must be clear that "the challenged . . . statute is susceptible of a construction

by the state judiciary that would avoid or modify the necessity of reaching a federal constitutional question." *Babbitt v. Farm Workers* 442 U.S. 289, 306 (1979).

In this case, two points should be made. First, both parties have centered their arguments on the constitutional provision and not on the ordinance in question. In short, at issue here is not the meaning of the statute, but the meaning of the Illinois constitutional provision, Article I, Section 22. That section provides: "Subject only to the police power, the right of the individual citizen to keep and bear arms shall not be infringed." Second, Illinois law regarding this constitutional provision is not wholly unsettled. The court has been given extensive portions of the debate from the Illinois constitutional convention regarding the intent of this clause. Moreover, since the adoption of the Illinois Constitution, Illinois courts have developed constitutional doctrines regarding the state's ability to regulate firearms. *See, e.g., People v. Williams,* 60 Ill.App.3d 726 (1st Dist. 1978) (ordinance prohibiting possession of a loaded weapon of any kind within city limits is constitutional); *Rawlings v. Illinois Dep't. of Law Enforcement,* 73 Ill.App.3d 267 (3d Dist. 1979) (ordinance prohibiting possession of weapons by any person who had been hospitalized in a mental institution within five years is constitutional).

In short, the inquiry here does not depend on an interpretation of unclear state law, but merely involves the application of established doctrines to the ordinance in question. In such situations abstention is not required. *Examining Board v. Flores de Otero,* 426 U.S. 572, 598 (1976); *Wisconsin v. Constantineau,* 400 U.S. 433, 438-39 (1971).

Finally, the decision to abstain is in the sound discretion of this court. *Wynn v. Carey,* 582 F.2d 1375 (7th Cir. 1978). If this court were to remand any portion of this case, it could only remand the state law questions. 28 U.S.C. § 1441(c). *England v. Louisiana State Board of Medical Examiners,* 375 U.S. 411 (1964). Thus, this case would be bifurcated and delays in resolving these important constitutional questions would inevitably result. If the case is remanded, there will be a trial court determination, followed by appellate review, followed by pos-

sible consideration by this court of federal claims, followed by still further appeals. During this delay process, valuable rights may be lost, judicial resources are squandered and the interests of the parties and justice are not well served. The avoidance of these injustices and delays is an appropriate reason for denying abstention. *Zbarac v. Quern,* 572 F.2d 582 (7th Cir. 1978).

For these reasons, the court denies plaintiff's motion for remand and abstention.

ENTER:

_____

United States District Judge

DATED: August 20, 1981.

Opinion by Judge Bauer

Judge Coffey dissenting

JUDGMENT—ORAL ARGUMENT

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

December 6, 1982.

Before

Hon. William J. Bauer, Circuit Judge
Hon. Harlington Wood, Jr., Circuit Judge
Hon. John L. Coffey, Circuit Judge

VICTOR D. QUILICI, ROBERT STENGL, *et al.*,
GEORGE L. REICHERT, and ROBERT E. METLER,
Plaintiffs-Appellants,

vs.

Nos. 82-1045,

81-1076 and 82-1132

VILLAGE OF MORTON GROVE, *et al.*,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division
Nos. 81 C 3432, 81 C 4086, and 81 C 5071
Bernard M. Decker, Judge

This cause was heard on the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this case appealed from be, and the same is hereby AFFIRMED, with costs, in accordance with the opinion of this Court filed this date.

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604

March 2, 1983

Before

Hon. WALTER J. CUMMINGS, Chief Judge
Hon. WILBUR F. PELL, JR., Circuit Judge
Hon. WILLIAM J. BAUER, Circuit Judge
Hon. HARLINGTON WOOD, JR., Circuit Judge
Hon. RICHARD D. CUDAHY, Circuit Judge
Hon. JESSE ESCHBACH, Circuit Judge
Hon. RICHARD A. POSNER, Circuit Judge
Hon. JOHN L. COFFEY, Circuit Judge

VICTOR D. QUILICI,
ROBERT STENGL, *et al.*,
GEORGE L. REICHERT,
and ROBERT E. METLER,
Plaintiffs-Appellants,
Nos. 82-1045, 82-1076 VS.
and 82-1132
VILLAGE OF
MORTON GROVE, *et al.*,
Defendants-Appelles.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. Nos. 81 C 3432, 81 C 4086 and 81 C 5071, Bernard M. Decker, Judge.

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above-entitled cause by the Plaintiffs-Appellants, Victor D. Quilici, Robert Stengl, George L. Reichert and Robert E. Metler, a vote of the active members of the Court was requested, and a majority * of the active members of the Court have noted to deny a rehearing *en banc*. A majority ** of the judges on the original panel have voted to deny the petition for rehearing. Accordingly,

It is ordered that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

* The Hon. Jesse Eschbach and the Hon. John L. Coffey both voted to grant a rehearing *en banc*.

** The Hon. John L. Coffey voted to grant a rehearing.

Office - Supreme Court, U.S.
FILED
JUN 30 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1930

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1982

GEORGE L. REICHERT and ROBERT E. METLER,
Petitioners,

v.

VILLAGE OF MORTON GROVE, *Respondent,*

BRIEF OF AMICI STATES OF ALABAMA, ALASKA, ARIZONA, HAWAII, IDAHO, LOUISIANA, MONTANA, NEBRASKA, NEVADA, VERMONT, WEST VIRGINIA AND WYOMING IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

	Page:
Interest of the Amici	2
Summary of Arguments	2
Argument	
I. The Abstention Doctrine Must Be Considered	3
II. Abstention is Required Here	4
III. The State Constitutional Provision is Unique	7
IV. The Court of Appeals' Abstention Analysis is Erroneous	7
Conclusion	9

TABLE OF AUTHORITIES

CASES:	*Page:*
AFA Distrib. Co. v. Pearl Brewing Co., 470 F.2d 1210 (4th Cr. 1973)	3
Albertson v Millard, 345 U.S. 242 (1953)	3
Askew v. Hargrave, 401 U.S. 476 (1971)	5
Bernhardt v. Polygraphic Co., 350 U.S. 198 (1956)	8
Chicago, B. & Q. R.R. v. City of North Kansas, 276 F.2d 932 (8th Cir. 1960)	3
City of Chicago v. Fieldcrest Dairies, 316 U.S. 168 (1942)	3
City of Meridian v. Southern Bell, 358 U.S. 639 (1959)	3, 5
Leiter Min., Inc. v. United States, 352 U.S. 220 (1957)	4
Oregon v. Corvallis Sand and Gravel Co., 429 U.S. 363 (1977)	3

Railroad Comm'n of Texas v. Pullman Co.,
312 U.S. 496 (1941) 3, 4

Reetz v. Bozanich,
397 U.S. 82, 87 (1970) 5

Rescue Army v. Municipal Court,
331 U.S. 549 (1947) 6

Spector Motor Serv., Inc. v. McLaughlin,
323 U.S. 101 (1944) 4

United Mineworkers v. Gibbs,
383 U.S. 715 (1966) 8

United Public Workers v. Mitchell,
330 U.S. 75 (1947) 4

Warth v. Seldin,
422 U.S. 490 (1975) 4

CONSTITUTIONAL PROVISIONS

U.S. CONST., Amend. II 7

U.S. CONST., Article III 3,8

ILL. CONST., Art. I, § 22 7

No. 82-1930

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1982

GEORGE L. REICHERT and ROBERT E. METLER,
Petitioners,

v.

VILLAGE OF MORTON GROVE, *Respondent,*

BRIEF OF AMICI STATES OF ALABAMA, ALASKA, ARIZONA, HAWAII, IDAHO, LOUISIANA, MONTANA, NEBRASKA, NEVADA, VERMONT, WEST VIRGINIA AND WYOMING

IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

INTEREST OF THE AMICI

This case is on petition for a writ of certiorari from the United States Court of Appeals for the Seventh Circuit which affirmed the decision of the District Court for the Northern District of Illinois, Eastern Division. The district court, in complete disregard of the long established doctrine of abstention, decided the validity of a local ordinance on state constitutional grounds. Although the opinion also upheld the ordinance on federal constitutional grounds, twenty-two of the twenty-five pages of the opinion dealt with the interpretation of a unique provision of the Illinois Constitution. The Court of Appeals opinion, in affirming the district court's decision, also dwelt at length with the interpretation of the state constitutional provision. Moreover, the Court of Appeals, in disposing of the abstention issue, erroneously construed the *Pullman* doctrine as it applies to this case.

Amici states are vitally interested in the preservation of the traditional principles of comity and federalism as well as the proper allocation of powers between the federal and state judiciary. Amici believe that unless vacated or reversed, the Court of Appeals opinion and the District Court decision set an erroneous and dangerous precedent wherein unsettled questions of state constitutional law are interpreted first by the federal courts, thereby preempting the state courts and their sovereign prerogative to interpret their unique constitutional provisions.

Amici strongly urge this Court to heed the views of the Amici states and give due consideration to the fundamental principles raised in their brief.

SUMMARY OF ARGUMENT

The abstention doctrine preserves the proper balance between the respective roles of the federal and state courts. The federal courts should not lightly interpret unique state constitutional provisions concerning state police power

without affording the state courts the opportunity to interpret them first. The decisions of the Court of Appeals and the District Court offend these considerations of federalism and comity, and they must be reversed and vacated.

ARGUMENT

I.

THE ABSTENTION DOCTRINE MUST BE CONSIDERED

The abstention question was not addressed by the district court in its final opinion. It was addressed by the Court of Appeals. See *Quilici v. Village of Morton Grove* 695 F.2d 261 265 n.2 (1982). Although the parties may not have raised it in the Courts below, federalism and prudential considerations require that in an appropriate case an appellate court may consider that issue *ex mero motu* and mandate abstention even when parties have not raised it. *AFA Distrib. Co. V. Pearl Brewing Co.*, 470 F.2d 1210 (4th Cir. 1973); *Chicago, Burlington & Quincy R.R. v. City of North Kansas*, 276 F.2d 932 (8th Cir. 1960). Furthermore, this Court may consider an issue raised solely by amici states in deciding the merits of a case. *Oregon v. Corvallis Sand and Gravel Co.*, 429 U.S. 363, 368 n. 3 (1977).

Indeed, in many instances the abstention issue was raised for the first time in this Court by the Court *sua sponte*. *See City of Meridian v. Southern Bell*, 358 U.S. 639 (1959); *Albertson v. Millard*, 345 U.S. 242 (1953); *City of Chicago v. Fieldcrest Dairies*, 316 U.S. 168 (1942);[1] *Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496 (1941).

The necessity for the appellate court to consider abstention on its own motion is grounded on basic principles of federal jurisdiction and federalism. It is fundamental that the lack of jurisdiction can be raised by the court at any time. Although the abstention doctrine does not always implicate the Article III case or controversy requirements,

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[1] *The Fieldcrest Dairies* case concerned a city ordinance, not unlike the ordinance involved here.

it is grounded on an equally important consideration going to the exercise of jurisdiction, i.e. prudential considerations and the policy of judicial self-restraint. As this Court emphasized in *Spector Motor Serv., Inc. v. McLaughlin*, 323 U.S. 101,105,(1944):

> If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality. . . unless such adjudication is unavoidable. And so, as questions of federal consitutional power have become more and more intertwined with preliminary doubts about local law, we have insisted that federal courts do not decide questions of constitutionality on the basis of preliminary guesses regarding local law. See, also, *Leiter Min., Inc. v. United States*, 352 U.S. 220 (1958).

It is, therefore, plain that the prudential consideration going to the invoking of the abstention doctrine must be put on the same plane as the prudential considerations going to the doctrine of standing and ripeness. See, *e.g.*, *Warth v. Seldin*, 422 U.S. 490 (1975); *United Public Workers v. Mitchell*, 330 U.S. 75 (1947). These considerations go to the fundamental question concerning the exercise of federal jurisdiction and must be determined by this Court even when they are not raised by the parties.

II.
ABSTENTION IS REQUIRED HERE

An unbroken line of cases has undisputedly established the requirement that when the federal constitutionality of a state law under challenge may be avoided by the interpretation of that state law on state law grounds, that state law should be first interpreted by the state court. This abstention doctrine, commonly known as the *Pullman* doctrine, was first enunciated by the Supreme Court in *Railroad Comm'n. of Texas v. Pullman Co.*, 312 U.S. 496 (1941):

> The reign of law is hardly promoted if an unnecessary ruling of a federal court is thus supplemented by a controlling decision of a state court. The resources of

equity are equal to an adjustment that will avoid the waste of a tentative decision as well as the friction of a premature constitutional adjudication.

The facts in this case are similar to this Court's decision in *City of Meridian v. Southern Bell, supra.* In that case, a federal district court, in construing a Mississippi statute, held that it violated both the state and federal constitutions. This Court vacated that decision and said:

> Proper exercise of federal jurisdiction requires that controversies involving unsettled questions of state law be decided in the state tribunals preliminary to a federal court's consideration of the underlying federal constitutional questions. * * * That is especially desirable where the questions of state law are enmeshed with federal questions. * * * Here, the state law problems are delicate ones, the resolution of which is not without substantial difficulty – certainly for a federal court. * * * In such a case, when the state court's interpretation of the statute or evaluation of its validity under the state constitution may obviate any need to consider its validity under the Federal Constitution, the federal court should hold its hand lest it render a constitutional decision unnecessarily. *Id.*, at 640-641.

Several years later, in a case where the validity of a challenged state law was again questioned under both state and federal constitutional grounds, the Supreme Court restated the doctrine in *City of Meridian* and reversed the district court's ruling on the constitutionality of an Alaskan law regulating fishing. The Court emphasized:

> The instant case is the classic case in that tradition, for here the nub of the whole controversy may be the state constitution. * * * We appreciate why the District Court felt concern over the effect of further delay on the plaintiffs, the appellees here; but we have concluded that the first judicial application of these constitutional provisions should properly be by an Alaska Court. *Reetz v. Bozanich*, 397 U.S. 82, 87 (1970). See, also, *Askew v. Hargrave*, 401 U.S. 476 (1971).

Another fundamental policy consideration requiring abstention in cases as this one is the long established policy of judicial self-restraint in not deciding federal constitu-

tional questions unless it is strictly necessary. As this Court explained in its seminal decision in *Rescue Army v. Municipal Court*, 331 U.S. 549 (1947):

> The policy's ultimate foundations, some if not all of which also sustain the jurisdictional limitation, lie in all that goes to make up the unique place and character, in our scheme, of judicial review of governmental action for constitutionality. They are found in the delicacy of that function, particularly in view of possible consequences for others stemming also from constitutional roots; the comparative finality of those consequences; the consideration due to the judgment of other repositories of constitutional power concerning the scope of their authority; the necessity, if government is to function constitutionally, for each to keep within its power, including the courts; the inherent limitations of the judicial process, arising especially from its largely negative character and limited resources of enforcement; withal in the paramount importance of constitutional adjudication in our system.
>
> All these considerations and perhaps others, transcending specific procedures, have united to form and sustain the policy. Its execution has involved a continuous choice between the obvious advantages it produces for the functioning of government in all its coordinate parts and the very real disadvantages, for the assurance of rights, which deferring decision very often entails. On the other hand it is not altogether speculative that a contrary policy, of accelerated decision, might do equal or greater harm for the security of private rights, without attaining any of the benefits of tolerance and harmony for the functioning of the various authorities in our scheme. For premature and relatively abstract decisions, which such a policy would be most likely to promote, have their part, too, in rendering rights uncertain and insecure. *Id* at 571.

III.

THE STATE CONSTITUTIONAL PROVISION IS UNIQUE

Amici are not advocating that abstention is always necessary whenever a state constitutional provision is implicated. In some cases when the state constitutional provision mirrors a Federal Consitutuional provision, abstention may not be required. However, in this case, the Illinois Constitutional provision is unique. Article I, § 22 of the Illinois Constitution provides:

> *Right to Arms*
>
> Subject only to the police power, the right of the individual citizen to keep and bear Arms, shall not be infringed.

This provision is markedly different from the Second Amendment to the United States Constitution, which states:

> A well regulated Militia, being necessary to the security of a free state, the right of the people to keep and bear Arms, shall not be infringed.

The Illinois constitutional provision does not refer to the *Militia*, and more importantly, it specifically refers to the police power. That police power could only mean the state's police power. Therefore, the limitation of the right to bear arms, in that state constitutional provision, must depend on the parameter of the state's police power, to be first construed by the Illinois courts and not the federal court. The uniqueness of the Illinois constitutional provision, therefore, is not different from the provision in the Alaska Constitution regarding fishing in the *Reetz* decision. These constitutional provisions go uniquely to the state's interest in regulating the conduct of its people. Until definitively construed by the state courts, the federal judiciary should stay its hand and avoid unnecessarily and prematurely usurping the state's prerogatives.

IV.

THE COURT OF APPEALS' ABSTENTION ANALYSIS IS ERRONEOUS

The Court of Appeals disposed of the abstention issue by characterizing the doctrine as one whose application depends on the importance of the right alleged to be involved in the lawsuit.[2] Although some decisions lend support to this analysis, they do not support the action of the Court of Appeals in reaching the merits of the *state constitutional* challenge. Assuming, *arguendo*, that a federal court may choose not to abstain because fundamental *federal* rights are involved, that decision not to abstain allows the federal court to reach the merits of the *federal* constitutional challenge raised in the lawsuit. That exercise of discretion does not always carry with it the mandate to decide the state law or state constitutional claim raised. The federal interpretation of a state constitutional provision which has not been definitively construed by the state's highest court usurps the prerogative of that court and offends considerations of federalism and comity. Article III of the Constitution does not endow the federal judiciary with the power to construe state constitutional provisions.[3] The power to reach state law claims comes under the "pendent jurisdiction" concept. *United Mine Workers of America v. Gibbs*, 383 U.S. 715 (1966). That jurisdiction, grounded on policy considerations of judicial administration as well as convenience and fairness to litigants, when measured against the limited grant of jurisdiction to federal courts in Article III, must be

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[2] The Court of Appeals opinion is internally inconsistent. In denying abstention it considered the issue of gun control of vital importance to every citizen and compared it to fundamental federal constitutional rights such as voting, racial equality or rights of expression. Yet, the opinion summarily rejected the petitioners' federal constitutional claims under the 2nd and 9th Amendments.

[3] Even in diversity cases, a federal court is required to *apply* state law as determined by the state's highest court and cannot reinterpret state law as it chooses. *Bernhardt v. Polygraphic Co.*, 350 U.S. 198 (1956).

narrowly exercised in situations where the state law claim concerns unsettled questions of state law, particularly when unique state constitutional questions are presented.

In this case, assuming the correctness of the Court of Appeals decision as to the need for the federal court to decide the important federal rights raised in the lawsuit, the courts below should have decided the lawsuit on the federal constitutional grounds alone, leaving the state constitutional questions for the state judiciary to decide. Although this approach may result in some unfairness to the litigants in not having all their claims decided in one forum, that disadvantage is far outweighed by the important federalism and comity concerns this approach will protect and preserve.

CONCLUSION

In the interest of federalism and comity amici states urge this court to vacate the decision below and order the district court to abstain from deciding the federal constitutional questions in order for the state court to decide the state constitutional challenge first. Alternatively, the decisions below on state constitutional grounds must be vacated.

Respectfully submitted this 30th day of June, 1983.

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